# TABLE OF CONTENTS


| | PAGE |
|---|---|
| Docket Entries | 1a |
| Order to Show Cause | 3a |
| Petition | 5a |
| Affidavit of David P. Steinmann | 16a |
| Reply Affidavit of Salvatore E. Rozzo | 17a |
| Transcript of Hearing Before Weinstein, J. | 24a |
| Memorandum and Order of Weinstein, J. | 38a |
| Opinion of Mansfield, D.J., for the Second Circuit | 43a |

## Docket Entries

| | Date<br>*1968* | |
|---|---|---|
| 1. | May 28 | —Petition filed together with order to show cause why an order should not be made pursuant to Rule 41 of the Federal Rules of Criminal Procedure directing the return of petitioner's property seized on May 18, 1968. |
| | May 29 | —Hearing on order to show cause before Rosling, J. |
| 2. | June 6 | —Affidavit of David P. Steinmann in opposition to motion for order to show cause. |
| 3. | June 12 | —Government's memorandum of law filed. |
| | June 12 | —Hearing on motion and order to show cause before Weinstein, J. Decision reserved. |
| 4. | June 28 | —Memorandum and order filed by Weinstein, J., granting the motion for suppression and return. |
| 5. | July 29 | —Notice of appeal filed. |
| 6. | September 6 | —Order filed by Travia, J., that time for docketing of record on appeal is extended from September 7, 1968 to October 17, 1968. |
| 7. | October 12 | —Reply affidavit of Salvatore E. Rozzo filed. |
| 8. | October 12 | —Petitioner's memorandum of law filed. |

*Docket Entries*

| | | |
|---|---|---|
| 9. | October 12 | —Petitioner's reply memorandum filed. |
| | October 14 | —Papers and certified copy of docket entries mailed to clerk of Court of Appeals. |
| 10. | October 16 | —Acknowledgment of papers endorsed upon index filed. |
| | *1969* | |
| 11. | March 26 | —Opinion of Mansfield, D.J., for the Second Circuit. |

## Order to Show Cause

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

In the Matter of the Petition of
THE COLONNADE CATERING CORP.

For the Return of Seized Property and the Suppression of Evidence

Upon the annexed verified petition of The Colonnade Catering Corp., duly verified the ..... day of May, 1968, let the United States Attorney for the Eastern District of New York, Michael J. LaPerch, Jr., Internal Revenue Service Alcohol Tax Unit Area Supervisor, and all persons acting under their direction, supervision and control, show cause at a term of this Court, to be held in Room 10, at the Court House, at Brooklyn, New York, on the 7th day of June, 1968, at 10:00 o'clock in the forenoon on that day, or as soon thereafter as counsel can be heard, why an order should not be made pursuant to Rule 41 of the Federal Rules of Criminal Procedure, directing that all property of which the petitioner is the owner which was seized on May 18, 1968 be returned to the petitioner; that any and all of the aforesaid property any anything obtained as a result of the search of petitioner's premises and seizure of petitioner's property, and any information directly or indirectly obtained therefrom or by means thereof, be suppressed for the use as evidence in any trial, hearing, or proceeding

upon the ground that the said property was illegally seized without a warrant; and, that the United States Attorney for the Eastern District of New York, the said officers, their agents and the agents of the Federal Government, and all other persons acting under their direction, supervision or control, and all other persons, be restrained and enjoined from using any of the seized property and anything obtained as a result of said search and seizure and any information directly or indirectly obtained therefrom or by means thereof in any trial, hearing, or proceeding, and it is further

ORDERED, that pending the hearing and determination of this petition, the United States Attorney, the said officers, and all other persons acting under their direction, supervision or control, and all other persons having possession of any of the aforesaid property or anything obtained as a result of the aforesaid illegal search and seizure or any information directly or indirectly obtained therefrom or by means thereof be restrained and enjoined from delivering or disclosing any of the same to any other person or persons, government or governmental agency.

Let service of a copy of this order and the papers upon which it was granted upon the United States Attorney for the Eastern District of New York, and upon the said Michael J. LaPerch, Jr., on or before the 4th day of June, 1968, be deemed good and sufficient service.

Dated: Brooklyn, New York, May 29th, 1968.

/s/ George Rosling
United States District Judge

## Petition

[Same Title]

State of New York )
County of New York ) ss.:

The petition of The Colonnade Catering Corp. respectfully shows and alleges:

1. That the petitioner is a domestic corporation duly organized and existing under the Laws of the State of New York, and has its principal place of business at 666 Sunrise Highway, Rockville Centre, New York. The petitioner is engaged in the catering business at its said premises and is licensed by the State of New York to serve alcoholic beverages.

2. That on May 18, 1968, certain property of which petitioner is the owner was unlawfully seized and taken from petitioner by agents of the Internal Revenue Service and a Nassau County policeman, without a search warrant and against petitioner's will.

3. The facts and circumstances surrounding the seizure of petitioner's property were as follows: That on May 18, 1968, at about 4:00 P.M., three Internal Revenue Service special investigators who identified themselves as Raymond Boylan, Oscar London and Louis Kozinn, and a Nassau County Police Department patrolman, who identified himself as J. Gaglio, entered upon petitioner's premises and made a search of the portion of the premises which were open to the public and where alcoholic beverages were at that time being served. Without the consent of petitioner or its agents or employees, they then also searched non-public

portions of the premises, including the basement. Thereafter, they demanded that petitioner's locked storeroom be opened for their inspection. Said storeroom was not in a portion of the premises open to the public and was locked. The said officers were advised that Salvatore E. Rozzo, petitioner's president and managing agent, was not then present on the premises and that he was the only person authorized to open the locked storeroom. Petitioner's said president is informed that petitioner's acting manager, William Greenberg, was told that unless the storeroom was opened, the officers would break the door to enter same and that one of the officers threatened to arrest Mrs. Rosalyn Feder, one of petitioner's employees, as an accomplice if she did not unlock the door. Mr. Greenberg then spoke on the telephone with Michael S. Stern, Esq., one of petitioner's attorneys, who thereupon spoke with one of the officers, who identified himself to Mr. Stern as Raymond Boylan. Mr. Stern asked Mr. Boylan if the officers had told Mr. Greenberg that unless the storeroom was unlocked, they would break down the door to gain access. Mr. Boylan denied that such statement was made.

Sometime thereafter, and prior to 6:00 P.M., the Internal Revenue Service area supervisor, Michael J. LaPerch, Jr., arrived and entered petitioner's premises and at about 6:00 P.M., petitioner's aforesaid president also arrived and had a conversation with the said Michael J. LaPerch, Jr. Mr. LaPerch demanded that petitioner's president, Salvatore E. Rozzo, open the locked storeroom for inspection by the officers. Mr. Rozzo asked if the officers had a search warrant and was told by Mr. LaPerch that they did not, and that they did not need one; that they were entitled to examine the entire premises, public, non-public, locked or unlocked, without a warrant and would break into the locked room if access was not given them.

Shortly after 6:30 P.M. on said day, the said officers forcefully broke into petitioner's locked storeroom and after entering and remaining therein by themselves for approximately thirty minutes, removed numerous sealed and unsealed bottles of liquor. The officers then proceeded to perform what they claimed to be chemical testing of the contents of several bottles of liquor in the petitioner's lobby.

The officers then asked Mr. Rozzo to sign certain receipts, true copies of which are annexed hereto, which the officers stated were receipts for the items which they were removing from petitioner's premises. Mr. Rozzo stated that he had no way of knowing what they had taken from the locked storeroom and that whatever they were taking was being taken without petitioner's consent and against petitioner's will. He, therefore, refused to sign any of the receipts. However, Louis Kozinn, one of the officers, then signed Mr. Rozzo's name on the receipts and left signed copies of same at petitioner's premises.

All of said officers having continuously remained on petitioner's premises since their respective arrivals, at approximately 8:00 P.M., they removed from petitioner's premises the property set forth in the annexed receipts without petitioner's consent and against petitioner's will.

4. That no arrest was made on May 18, 1968 or to date, and upon information and belief, no proceedings of any kind whatever have been commenced against petitioner or any of petitioner's officers, servants, agents or employees.

5. That petitioner is informed that all of the seized property has been delivered to the Internal Revenue Service Chemist in Charge for testing.

6. That the aforesaid search and seizure was illegal and unwarranted, in that it violates the provisions of the Con-

stitution of the United States, and the retention or use of any property seized as alleged evidence infringes upon petitioner's Constitutional rights. Petitioner, therefore, asks for the return of all of said property so seized and the suppression of any evidence obtained as a result of the said illegal search and seizure, if it is intended to be used against petitioner or any of petitioner's officers, directors, agents or employees.

7. That petitioner seeks the relief herein sought by order to show cause in order that the said officers and all other persons be restrained and enjoined from delivering any of the seized property or disclosing any information obtained as a result of the illegal search and seizure to any other person pending the hearing and determination of this petition.

8. That no previous application has been made for the relief sought herein.

WHEREFORE, petitioner respectfully requests the following relief:

A. That all of the aforesaid property unlawfully seized without a search warrant be returned to petitioner.

B. That anything obtained as the result of the aforesaid illegal search and seizure and any information directly or indirectly obtained therefrom or by means thereof be suppressed for use as evidence and excluded in any trial, hearing or other proceeding and that the Court grant an order of suppression accordingly.

C. That pending the hearing and determination of this petition, the United States Attorney, the said Michael J. LaPerch, Jr., and he said officers, their agents and the agents of the Federal Government, and all other persons

acting under their direction, supervision or control, and all other persons having possession of any of the aforesaid property or anything obtained as a result of the aforesaid illegal search and seizure or any information directly or indirectly obtained therefrom or by means thereof be restrained and enjoined from delivering or disclosing any of the same to any other person or persons, government or governmental agency.

Dated: May 28, 1968.

THE COLONNADE CATERING CORP.,
Petitioner

By /s/
SALVATORE E. ROZZO,
President

*Petition*

State of New York )
County of New York ) ss.:

Salvatore E. Rozzo, being duly sworn, deposes and says that he is the president of The Colonnade Catering Corp., the corporation named in the within petition; that he has read the foregoing petition and knows the contents thereof; and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

This verification is made by him because The Colonnade Catering Corp. is a domestic corporation. He is an officer thereof, to wit, the president.

The grounds of the undersigned's belief as to all matters not stated upon his knowledge are as follows: Conversations with employees of the petitioner.

/s/
Salvatore E. Rozzo

Sworn to before me this 28th day of May, 1968.

/s/ Jerome M. Stember
Notary Public, State of New York
No. 30-3833850
Qualified in Nassau County
Commission Expires March 30, 1969

## Petition

FORM 1689 (REV. JULY 1963)

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

# REMOVAL AND SUBMISSION OF SAMPLES FOR TESTING

(See instructions on bottom of form)

(1)

ASSISTANT REGIONAL COMMISSIONER (Region) NORTH ATLANTIC

ORIGINATING TRADE NAME, IF ANY THE COLONNADE CATERING CORP.

NUMBER AND STREET, CITY, ZONE, COUNTY AND STATE 666 SUNRISE HIGHWAY, ROCKVILLE CENTRE, N.Y.

| KIND OF ESTABLISHMENT | REGISTRY NO. | PERMIT NO. | SPECIAL TAX STAMP | CASE NO. | DATE PROCURED OR SEIZED |
|---|---|---|---|---|---|
| R.L.D. | | | 473117 | 45327 | 5-28-68 |

Samples drawn from the above premises, for the purpose of testing by the Internal Revenue Service, Alcohol and Tobacco

Tax Division, are:

### ARTICLES, MATERIALS, DISTILLED SPIRITS, ETC.

| CONTAINERS: FROM (Inclusive) | TO (Inclusive) | SIZE | KIND (Whether full, partly full, or empty) | DESCRIPTION OF CONTENTS | PURPOSE OF ANALYSIS OR TEST (Proof, alcoholic content, color, etc.) |
|---|---|---|---|---|---|
| 1612 | 1 | 4T | FULL | J & B SCOTCH | TO DETERMINE IF GENUINE |
| 13 | 2 | 5T | FULL | J & B SCOTCH | TO DETERMINE IF GENUINE |
| 14 | 3 | 5T | FULL | J & B SCOTCH | TO DETERMINE IF GENUINE |
| 15 | 4 | 5T | FULL | J & B SCOTCH | " " " " |
| 16 | 5 | 5T | FULL | J & B SCOTCH | " " " " |
| 17 | 6 | 5T | FULL | J & B SCOTCH | " " " " |
| 18 | 7 | 5T | FULL | J & B SCOTCH | " " " " |
| 19 | 8 | 5T | FULL | J & B SCOTCH | " " " " |
| 20 | 9 | 5T | FULL | J & B SCOTCH | " " " " |
| 21 | 10 | 5T | FULL | CHIVAS REGAL | " " " " |
| 22 | 11 | 5T | FULL | CHIVAS REGAL | " " " " |
| 23 | 12 | 5T | FULL | CHIVAS REGAL | " " " " |
| 24 | 13 | 5T | FULL | WHITE & WHITE SCOTCH | " " " " |
| 25 | 14 | 5T | FULL | " " " " | " " " " |

If distilled spirits (or wines) are found to be as represented on the label, such part of the sample that remains after tests [illegible] indicated below. However, if refund or credit of tax is to be given on the sample,

[illegible] will not be returned

Authority to destroy [illegible] distilled spirits (or wines) are removed with the consent of the undersigned proprietor.

CONTAINERS SEALED IN MY PRESENCE BY (Check type seal or specify)

[illegible] OTHER (Specify)

[illegible]

SIGNATURE OF OFFICER

[illegible]

TITLE SPECIAL INVESTIGATOR

DATE TRANS. TO LABORATORY

BY (Name and title)

### INSTRUCTIONS

[illegible] articles, materials, or spirits submitted by proprietors, officers, and in quintuplicate for tax-determined spirits removed from bottling premises of distilled spirits plants. The original will be furnished the proprietor, one copy will accompany the sample(s), one copy will be sent to the Area Supervisor, one copy, if prepared in quintuplicate, will be sent to the Technical Ruilings and Services Section, and the remaining copy will be retained.

[illegible] articles, materials, or spirits submitted [illegible] The original will be [illegible] copy will accompany the sample(s), [illegible] copies will be attached to the report of inspection or investigation.

FORM 1689 (REV. 7-67)

# Petition

FORM 1669 (REV. JULY 1962)

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

## REMOVAL AND SUBMISSION OF SAMPLES FOR TESTING

(See instructions at bottom of form)

(2)

ASSISTANT REGIONAL COMMISSIONER (Region)
NORTH ATLANTIC

NAME AND TRADE NAME, IF ANY
THE COLONNADE CATERING CORP.

NUMBER AND STREET, CITY, ZONE, COUNTY AND STATE
666 SUNRISE HIGHWAY, ROCKVILLE CENTRE NY

| KIND OF ESTABLISHMENT | REGISTRY NO. | PERMIT NO. | SPECIAL TAX STAMP | CASE NO. | DATE PROCURED OR MAILED |
|---|---|---|---|---|---|
| RD | | | 473217 | F-1-1227 | 8-18-68 |

There are transmitted herewith, for the purpose of testing by the Internal Revenue Service, Alcohol and Tobacco Tax, the following:

ARTICLES, MATERIALS, DISTILLED SPIRITS, ETC.

| CONTAINERS | | | | DESCRIPTION OF CONTENTS | PURPOSE OF ANALYSIS OR TEST (Proof, alcoholic content, color, etc.) |
|---|---|---|---|---|---|
| FORM 1488 NO. | NUMBER | SIZE | PORTION FILLED | | |
| 79626 | 15 | ST | FULL | WHITE LABEL SCOTCH | TO DETERMINE IF GENUINE |
| 27 | 16 | 4/5 | FULL | " " " " | " " " " |
| 28 | 17 | 4/5 | 3/4 | " " " " | " " " " |
| 29 | 18 | 4/5 | 3/4 | " " " " | " " " " |
| 30 | 19 | ST | FULL | HAIG SCOTCH | " " " " |
| 31 | 20 | ST | 1/2 | " " " | " " " " |
| 32 | 21 | 4/5 | FULL | GRANT'S SCOTCH | " " " " |
| 33 | 22 | ST | 1/4 | BALLANTINES SCOTCH | " " " " |
| 34 | 23 | ST | 1/4 | 100 PIPERS SCOTCH | " " " " |
| 35 | 24 | 4/5 | FULL | WILD TURKEY | " " " " |
| 36 | 25 | 4/5 | FULL | " " | " " " " |
| 37 | 26 | 4/5 | 3/4 | " " | " " " " |
| 38 | 27 | ST | FULL | HENNESSY COGNAC | " " " " |
| 39 | 28 | 4/5 | 1/2 | " " " " | " " " " |
| 40 | 29 | 4/5 | FULL | " " " " | " " " " |
| 79611 | 30 | 4/5 | 1/2 | SEAGRAMS 7 CROWN | " " " " |

If unpaid distilled spirits (or wines) are found to be as represented on the label, such part of the sample that remains after tests have been completed will be returned to [illegible]. However, if refund of excise tax is to be given on the sample, the [illegible] will be retained.

Samples:

☒ will ☐ will not be returned

Authority to withdraw samples of tax-paid spirits (or wines) are removed with the consent of the undersigned proprietor.

| CONTAINERS SEALED IN MY PRESENCE BY (Check type seal or specify) | SIGNATURE OF OFFICER |
|---|---|
| ☐ WAX ☐ CELLOPHANE ☒ PAPER ☐ OTHER (Specify) | [signature] |
| SIGNED (Proprietor) [signature] | TITLE SP. INVESTIGATOR |
| BY (Name and title) [signature] SP. INV. | DATE TRANS. TO LABORATORY / BY (Name and title) |

### INSTRUCTIONS

[illegible] and check [illegible] Copy will be attached on following:

(1) In duplicate for articles, materials, or spirits. The original will be furnished the proprietor and the copy will be attached to the report of investigation.

(2) In triplicate for articles, materials, or spirits submitted by assigned officers and in quintuplicate for tax-determined spirits removed from bottling premises of distilled spirits plants. The original will be furnished the proprietor, one copy will accompany the sample(s), and the copy will be attached to the report of investigation.

(3) In quintuplicate for articles, materials, or spirits submitted by assigned officers and in quintuplicate for tax-determined spirits removed from bottling premises of distilled spirits plants. The original will be furnished the proprietor, one copy will accompany the sample(s), one copy will be sent to the Area Supervisor, one copy, if prepared in quintuplicate, will be sent to the Technical Assistance and Services section, and the remaining copy will be retained.

If [illegible] the [illegible] of [illegible]

[illegible] the premises copy will be attached to the report of inspection or investigation.

FORM 1669

13a

# Petition

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

Form 1669 (Rev. July 1962)

## REMOVAL AND SUBMISSION OF SAMPLES FOR TESTING

(See instructions at bottom of form)

(7)

ASSISTANT REGIONAL COMMISSIONER (Region)

NORTH ATLANTIC

NAME AND TRADE NAME, IF ANY

THE COLONNADE CATERING CORP.

NUMBER AND STREET, CITY, ZONE, COUNTY AND STATE

446 S. NYACK HIGHWAY ROCKVILLE CENTRE N.Y.

| KIND OF ESTABLISHMENT | REGISTRY NO. | PERMIT NO. | SPECIAL TAX STAMP | CASE NO. | DATE PROCURED OR MAILED |
|---|---|---|---|---|---|
| RLD | | | 473117 | C.I. 3897 | 5-18-68 |

There are removed from the above premises, for the purpose of testing by the Internal Revenue Service, Alcohol and Tobacco Tax, the following:

### ARTICLES, MATERIALS, DISTILLED SPIRITS, ETC.

| CONTAINERS: Form 5000.24 No. | CONTAINERS: Number | CONTAINERS: Size | CONTAINERS: Condition (Full) | DESCRIPTION OF CONTENTS | PURPOSE OF ANALYSIS OR TEST (Proof, alcoholic content, color, etc.) |
|---|---|---|---|---|---|
| 79642 | 31 | 4/5 | FULL | SEAGRAMS CROWN ROYAL | TO DETERMINE IF LABELING |
| 43 | 32 | 4/5 | FULL | " " " " | " " " " " " |
| 44 | 33 | 4/5 | 1/2 | SCHENLEY | " " " " " " |
| 45 | 34 | QT | FULL | I.W. HARPER | " " " " " " |
| 46 | 35 | QT | FULL | CANADIAN CLUB | " " " " " " |
| 47 | 36 | 4/5 | 1/2 | OLD GRAND-DAD | " " " " " " |
| 48 | 37 | 4/5 | FULL | JACK DANIELS | " " " " " " |
| 79649 | 38 | 4/5 | 1/2 | DEAHDAIR | " " " " " " |
| 79772 | A | 4/5 | FULL | WILD TURKEY | COMPARATIVE SAMPLE |
| | B | QT | FULL | I.W. HARPER | " " " |
| | C | 4/5 | FULL | SEAGRAMS CROWN ROYAL | " " " |
| | D | 1/5 | FULL | OLD GRAND-DAD | " " " |
| | E | QT | FULL | J&B SCOTCH | " " " |
| 79777 | F | QT | FULL | HAIG SCOTCH | " " " |
| 79760 | G | 4/5 | FULL | WHITE LABEL | " " " |

If tax-paid distilled spirits (or wines) are found to be as represented on the label, such part of the sample that remains after tests are completed will or will not be returned as indicated below. However, if refund or credit of tax is to be given on the sample, it will not be returned.

Samples:

[ ] will [ ] will not be returned

Articles, bottled tax-paid distilled spirits (or wines) are removed with the consent of the undersigned proprietor.

CONTAINERS SEALED IN MY PRESENCE BY (Check type seal or specify)

CELLO-PHANE [ ] PAPER [X] OTHER (Specify) [ ]

SIGNED (Proprietor)

SIGNATURE OF OFFICER

TITLE Special Investigator

BY (Name and title)

DATE TRANS. TO LABORATORY

BY (Name and title)

### INSTRUCTIONS

[illegible] the original copy will be attached to the report of investigation or inventory taken.

(3) In quintuplicate for articles, materials, or spirits submitted by assigned officers and in quintuplicate for tax-determined spirits removed from bottling premises of distilled spirits plants. The original will be furnished the proprietor, one copy will accompany the sample(s), one copy will be sent to the Area Supervisor, one copy, if prepared in quintuplicate, will be sent to the Technical Guidance and Services Section, and the remaining copy will be retained.

[illegible] case of seizure [illegible]

FORM 1669 (REV. 7-63)

## *Petition*

FORM 1669 (REV. JULY 1962)

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

# REMOVAL AND SUBMISSION OF SAMPLES FOR TESTING

(See instructions at bottom of form)

(4)

ASSISTANT REGIONAL COMMISSIONER (Region)

NEW ATLANTIC

NAME AND TRADE NAME, IF ANY

THE GOLDEN APE CATERING CO.

NUMBER AND STREET, CITY, ZONE, COUNTY AND STATE

666 SUNRISE HIGHWAY ROCKVILLE CENTER N.Y.

| KIND OF ESTABLISHMENT | REGISTRY NO. | PERMIT NO. | SPECIAL TAX STAMP | CASE NO. | DATE PROCURED OR SEIZED |
|---|---|---|---|---|---|
| RLD | | | | L.I. 5211 | 12-12-67 |

Samples are removed from the above premises, for the purpose of testing by the Internal Revenue Service, Alcohol and Tobacco Tax, the following:

ARTICLES, MATERIALS, DISTILLED SPIRITS, ETC.

| FORM 1692 NO. | CONTAINERS NUMBER | CONTAINERS SIZE | CONDITION FULL OR PART | DESCRIPTION OF CONTENTS | PURPOSE OF ANALYSIS OR TEST (Proof, alcoholic content, color, etc.) |
|---|---|---|---|---|---|
| 79761 | H | 1/5 | FULL | GRANTS SCOTCH | TO HAVE AND SAMPLE |
| 79662 | H-1 | 1/5 | FULL | BALLANTINES SCOTCH | " " " " |
| 79679 | I | 1/5 | FULL | CHIVAS REGAL | " " " " |
| | 20 J | 1/5 | FULL | JACK DANIELS | " " " " |
| | 21 K | 5T | FULL | CANADIAN CLUB | " " " " |
| | 22 L | 5T | FULL | SEAGRAMS 7 C. | " " " " |
| | 23 M | 5T | FULL | 100 PIPERS | " " " " |
| 79624 | N | 5T | FULL | NAIG NAIG LINEN | " " " " |

If samples distilled spirits for wines' are found to be as represented on the label, such part of the sample that remains after tests have been made shall be returned as indicated below. However, if evidence of lack of [illegible] in the sample, [illegible] shall be retained.

DISPOSAL

[illegible] be returned

A [illegible] of the [illegible] hereby requested [illegible] be removed with the consent of the undersigned proprietor.

CONTAINERS SEALED IN MY PRESENCE BY (Mark & type seal or specify)

[X] TAX CELLOPHANE [ ] PAPER [ ] OTHER (Specify)

SIGNATURE OF OFFICER

[illegible]

SIGNED (Proprietor)

[illegible]

TITLE

SPECIAL AGENT

BY (Name and title)

[illegible]

DATE TRANS. TO LABORATORY

BY (Name and title)

INSTRUCTIONS

[illegible]

FORM 1669

# Petition

FORM 1669 (REV. JULY 1962)

U.S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

## REMOVAL AND SUBMISSION OF SAMPLES ~~FOR TESTING~~

(See instructions at bottom of form)

ASSISTANT REGIONAL COMMISSIONER (Regions)

[illegible]

NAME AND TRADE NAME, IF ANY

[illegible] CATERING CORP

NUMBER AND STREET, CITY, ZONE, COUNTY AND STATE

[illegible] Rockville Centre, NY

| KIND OF ESTABLISHMENT | REGISTRY NO. | PERMIT NO. | SPECIAL TAX STAMP | CASE NO. | DATE PROCURED OR SEIZED |
|---|---|---|---|---|---|
| [illegible] | | | [illegible] | [illegible] | 5/16/68 |

The undersigned requests that the samples listed below, taken from the above premises, for the purpose of testing by the Internal Revenue Service, Alcohol and Tobacco Tax, be released to:

ARTICLES, MATERIALS, DISTILLED SPIRITS, ETC.

| CONTAINERS | | | | DESCRIPTION OF CONTENTS | PURPOSE OF ANALYSIS OR TEST (Proof, alcoholic content, color, etc.) |
|---|---|---|---|---|---|
| SAMPLE NOS. | NUMBER | SIZE | PROOF OR WEIGHT | | |
| 1 | 1 | | | PLASTIC FUNNEL | FOR EVIDENCE |
| 2 | 1 | | | METAL FUNNEL | FOR EVIDENCE |

If samples of distilled spirits (or wines) are found to be as represented on the label, such part of the sample that remains after tests [illegible] shall not be returned as indicated below. However, if refund or credit of tax is to be given on the sample, [illegible] shall not be returned.

Original

[illegible] shall not be returned

Authorized removal samples of distilled spirits (or wines) are removed with the consent of the undersigned proprietor.

CONTAINERS SEALED IN MY PRESENCE BY (Check type seal or specify)

GUMMED PAPER ___ OTHER (Specify) ___

ABC Sealed (Signature) [illegible]

SIGNATURE OF OFFICER

[illegible]

TITLE Special Investigator

BY (Name and title) [illegible]

DATE TRANS. TO LABORATORY

BY (Name and title)

### INSTRUCTIONS

[illegible] shall be submitted [illegible] Internal Revenue Service. The original will be [illegible] accompany the sample(s). The duplicate copy will be attached to the request of importers or bona fide [illegible] to be packaged or be subject, materials, or spirits submitted by [illegible] officers and to manufacturers of distilled spirits plants, removed from bottling premises of distilled spirits plants. The original will be furnished the proprietor, one copy will accompany the sample(s), one copy will be sent to the Area Supervisor, one copy, if prepared in quadruplicate, will be sent to the Technical Tastings and Services Section, and the remaining copy will be retained.

FORM 1669 (REV. 7-62)

## Affidavit of David P. Steinmann

[Same Title]

State of New York )
County of Kings ) ss.:

David P. Steinmann, being duly sworn, deposes and says that he is an Assistant United States Attorney, duly appointed according to law and acting as such.

This affidavit is submitted in opposition to defendant's motion for an Order to Show Cause requiring the suppression and return of certain alcoholic spirits seized by Special Investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service.

The facts of this case and the law governing these facts are fully set forth in the Government's Memorandum of Law which is submitted herewith. Upon information and belief and after conversations with the Special Investigators involved in this case, it is submitted that the inspection, examination and seizure here complained of were authorized by statute and were lawful in all respects.

Wherefore, it is respectfully submitted that for the reasons set forth in the aforementioned Memorandum of Law, and such other facts and evidence as may be brought to the attention of the Court at the time of the hearing of this motion, defendant's motion for an Order to Show Cause should be denied.

David P. Steinmann
Asst. United States Attorney

(Sworn to June 6, 1968.)

## Reply Affidavit of Salvatore E. Rozzo

[Same Title]

State of New York )
County of New York ) ss.:

Salvatore E. Rozzo, being duly sworn, deposes and says:

1. That I am the President and General Manager of The Colonnade Catering Corp., the petitioner herein, and make this affidavit in reply to the affidavit of David P. Steinmann, Assistant United States Attorney and the Government's Memorandum of Law, in opposition to the petitioner's motion herein.

2. It must be noted that the Government has failed to furnish any affidavit setting forth the facts surrounding the search and seizure of petitioner's property, by anyone having personal knowledge thereof. Indeed, the only affidavit submitted by the Government sets forth no facts whatsoever. This affidavit, executed by David P. Steinmann, Assistant United States Attorney, alleges "upon information and belief and after conversations with the Special Investigators involved in this case" that the facts are "fully set forth in the Government's Memorandum of Law". Your deponent has been advised and verily believes that such an affidavit is without any probative value whatsoever. However, since the "facts" as set forth in the Government's hearsay memorandum are argumentative, inaccurate, misleading and untrue in many respects, deponent desires to supplement his previously verified petition in support of this motion with sufficient additional information so that the Court will be in possession of all

the facts and circumstances surrounding this illegal search and seizure.

3. The Government's memorandum of law begins by characterizing the investigation of petitioner's premises as "routine". Based on statements made to petitioner by the Internal Revenue Service Area Supervisor and one of the Special Investigators, petitioner believes that this was more than just a "routine" investigation. However, without laboring this difference, the hearsay statements contained in the Government's memorandum build on inference and implication rather than fact. The memorandum states: "Toward the rear of this area the Investigators observed *what appeared to be* one or more bartenders pouring bottles of whiskey into the sink of a 'floating bar'. The Investigators approached the bar and smelled whiskey in the sink. All of the whiskey bottles visible were empty." [Emphasis added.] Deponent is uncertain as to what the Special Investigators actually claim to have seen. If they actually saw "one or more bartenders pouring bottles of whiskey into the sink of a floating bar", they certainly could have stopped at least one of the bartenders from emptying at least one of the bottles since they were there. However, the fact is that no whiskey was poured into the sink of a floating bar by any bartender at any time. The floating bars, of which there were two being used at the time these Investigators and the Nassau County police officer entered the petitioner's premises, are small carts, approximately two feet by three feet in dimension, on wheels. All liquor being served after 1:30 P.M. on the day in question was served from these rolling or floating bars. Neither of these rolling or floating bars contains a sink. They are nothing more nor less than carts on which bottles of liquor, glasses and buckets of ice are placed with mixers and the like. These rolling bars con-

tained all of the liquor being served at this party from approximately 1:30 that afternoon. Since neither of these rolling bars contains a sink, it was an impossibility for anybody to pour whiskey into the sink of a floating bar.

4. It is noteworthy that, to bolster the aforesaid hearsay claim, the Investigators further claim that they smelled whiskey in the sink. Since these floating bars contain no sinks, this claim is obviously untrue.

5. Prior to 1:30 in the afternoon of the day in question, the party in progress was being served from a permanent bar. At approximately 1:30 P.M. on that day, this bar was "broken down" and liquor and other mixings, etc., were transferred to the aforesaid two rolling bars. Therefore, this permanent bar was not being used for the service of drinks after 1:30 P.M. on that day. Although this permanent bar does contain a sink, this is not the sink referred to in the Government's memorandum. Nor were any bartenders stationed at this bar at the time of the "inspection", both bartenders employed at that time being stationed with their rolling bars in the room itsef. A smell of whiskey by these Investigators behind the permanent bar is of no probative value whatsoever. Deponent has been in proximity to many bars and the smell of alcoholic beverages is constantly observable behind a liquor bar, particularly where dregs of drinks may have been poured down a sink prior to 1:30 P.M. on the day in question and where all the liquor necessary to replenish the rolling bars from time to time was also stored. Also, bottles consumed during the affair on the day in question were returned to the standing bar for inventory control purposes, which would also serve to create an alcoholic aroma.

6. The statement by the Investigators that "all of the whiskey bottles visible were empty" is also unworthy of belief. The affair being conducted in petitioner's premises on the day in question continued until 5:30 P.M. on that afternoon. The Investigators arrived at approximately 4:00 P.M. During the hour and one-half which elapsed between the arrival of the Investigators and the completion of the affair, the rolling bars were being used continuously for the service of alcoholic beverages. No alcoholic beverages whatsoever were brought into the party room at any time after 12:30 P.M. on that day. All liquor required for this party was in the room itself, either behind the permanent bar or on the floating bars. Obviously, then, all of the liquor bottles visible to the Investigators could not have been empty. Indeed, at the conclusion of the affair, all whiskies not consumed during the affair were returned by the bartenders to petitioner's control and were in full view of the Investigators outside the locked liquor storeroom.

7. Petitioner has devoted many words to refuting the contentions made in the Government's memorandum, despite the fact that, as previously stated, petitioner has been advised and truly believes that the hearsay statement of so-called facts set forth in the said Government's memorandum is entitled to no weight whatsoever.

8. An additional factual mis-statement contained in the Government's memorandum is the hearsay allegation that "petitioner's liquor was stored in a small room approximately adjacent to the ballroom" and that petitioner's storeroom "was adjacent and convenient to the ballroom area" where liquor was then being served to patrons. Actually, the locked storeroom in question was and is approximately seventy-five feet from the entrance to the ball-

room and is separated from the ballroom by the kitchen, office and lavatory facilities of petitioner and a corridor. This attempt by the Government to color and distort the true facts by means of hearsay and untrue allegations is an attempt to raise dust and throw same into the eyes of the Court.

9. The hearsay recital of the alleged facts in the Government's memorandum may lead to a conclusion that the storeroom which the Government Agents forcibly broke into was not locked. Although the Government's memorandum does concede that the entry was made without consent and that the storeroom was locked, Investigator LaPerch was compelled to do much more than "push the door to the storeroom open" to gain access. As a matter of fact, the Investigators forcibly broke into the storeroom, actually tearing the door latch from the door frame. Upon the argument of this motion, petitioner will submit a photograph to establish the extent of the force applied.

10. There are other errors and omissions contained in the Government's hearsay allegations, such as their omission of the fact that the three agents and Nassau County policeman on the premises, called Michael J. LaPerch, Jr., the Area Supervisor, after they were refused access to the locked storeroom to come to the premises, as well as the Government's omission of the fact, as disclosed by the Government's receipt annexed to petitioner's moving papers, that two funnels used by petitioner to transfer sacramental wine from commercial containers to altar decanters used for religious wedding ceremonies, were removed from petitioner's premises "for evidence". It is also noteworthy to point out that the Government's receipts, true copies of which are annexed to petitioner's moving papers, provide a place for the signature of the

proprietor of the establishment being "inspected" and consenting to the removal of the property set forth thereon. Said receipts were not signed by petitioner and were signed by the Government's Special Investigator who made them out. No consent to this illegal entry was ever given by petitioner or anyone on its behalf.

11. Without any factual affidavit, and based on inference, conjecture and surmise, the Government has colored the actual facts of this illegal forcible search and seizure of petitioner's property in many respects. The locked storeroom was, contrary to the Government's assertion, not part of the public area or close or adjacent to it; it was approximately seventy-five feet from the entrance to the ballroom. The storeroom was never open during the time of the party on petitioner's premises until the Government Investigators forcibly broke the lock against the express disapproval by petitioner. No evidence was "disposed of by apparently pouring it down the drain". As a matter of fact, nowhere does the Government state unequivocally that the Investigators in fact actually saw any of petitioner's employees pouring whiskey down any sink. This is understandable for, in fact, no such acts were performed.

12. As will be more fully set forth in petitioner's reply memorandum of law, even if the Investigators had seen such acts, their failure to obtain a search warrant and their forcible entry into petitioner's locked storeroom requires that all property removed by them be returned to petitioner, together with the other relief prayed for in the petition. The Government states in its memorandum that "The only alternative to the course followed by the Investigators here would have been to maintain surveillance inside the premises to insure against the destruction of any refilled bottles until sometime the following Monday when an Assistant United States Attorney and a United States Commissioner could be contacted and a search warrant

obtained." Upon information and belief, this statement is wholly untrue. Your deponent is advised and verily believes that an Asistant United States Attorney and a United States Commissioner are on call at all times for the purpose of obtaining both search warrants and arrest warrants during the weekend as well as during the week. It was not "well into the evening on a Saturday when the inspection took place" as claimed by the Government. The Inspectors arrived at 4:00 P.M. and there was little doubt that there was time to obtain a search warrant after their arrival. However, petitioner is advised by counsel and verily believes that the agents should have had a search warrant in their possession at the time of their arrival at petitioner's place of business under the provisions of the cases cited in petitioner's memorandum and reply memorandum of law. That the agents did not obtain a search warrant prior to their forcible entry into the locked storeroom without petitioner's consent and, indeed, against petitioner's vehement and specific disapproval, violates petitioner's Constitutional rights and the search and seizure are therefore invalid.

WHEREFORE, petitioner respectfully requests the relief requested in the petition herein, togther with such other and further relief as may be just and proper in the premises.

/s/
SALVATORE E. ROZZO

Sworn to before me this 11th day of June, 1968.

MICHAEL S. STERN
Notary Public, State of New York
No. 60-3839185
Qualified in Westchester County
Commission Expires March 30, 1969

## Transcript of Hearing Before Weinstein, J.

United States Courthouse
Brooklyn, New York
June 12, 1968

Before:

JACK B. WEINSTEIN, U. S. D. J.

Appearances:

JEROME M. STEMBER, ESQ., Attorney for Petitioner.
JOSEPH P. HOEY, ESQ., United States Attorney, By: DAVID STEINMANN, ESQ., Assistant United States Attorney.

WINFRED D. LEWIS, Official Court Reporter.

Mr. Stember: Your Honor, my name is Jerome M. Stember. I appear for the Petitioner, Colonnade Catering Corporation.

Petitioner is a catering establishment and is a licensee under the laws of the State of New York to dispense alcoholic beverages, and is also subject to the tax of the Federal Alcoholic Beverage Control.

The essential facts are actually set forth in our petition, your Honor. The record, frankly, has been cluttered, I believe, with much non-essential information, primarily because I felt that the Government had by means of heresay imputations in its memorandum, not with an affidavit, introduced prejudicial material which had only one purpose, and that was to prejudice the petitioner in the eyes of the Court.

And I thought that it was essential that if the record be read that the true facts actually be set forth in affidavit form, and we have done so.

I believe that the essential facts that are important here are that on a Saturday afternoon at approximately 4:00 p.m., May 18th to be exact, Plaintiff's place was visited by four Internal Revenue Special Investigators, including an area supervisor, who arrived at the premises later, incidentally, in response to a call from one of the three original ones.

Also present and with these investigators was a Nassau County Patrolman.

They identified themselves and went into the ballroom, where a party was at that time in progress and alcoholic beverages were being served.

They inspected the bar, the rolling bars which were being used at that time. Your Honor, a rolling bar, for your information, is nothing more nor less than a serving cart, it's a tea cart on which bottles, a bucket of ice, some soda, some mixings are contained. It contains no sink.

I have a picture of a rolling bar—it's a very bad picture taken with a Pollaroid at the place, if your Honor would have any interest in seeing it whatsoever.

They thereupon, these investigators thereupon insisted upon examining the rest of the premises, and against the will of the banquet manager, who was the employee of the corporation in charge at that time, searched the cellar and basement of the premises. They thereupon asked that the liquor storeroom or any storeroom which contains liquor be opened to them.

It was explained to them at that time that the liquor store was locked, that the key was not on the premises, that the only person who had authority to enter the storeroom was the general manager, who was not then there.

They threatened to break the door down, or so I have been told.

Access to the liquor storeroom was denied to them by the employees on the premises. However, they were told that the president and general manager of the corporation would arrive shortly.

Upon his arrival they made demands and threats, insisting upon getting into the liquor storeroom, requiring him to open it. He refused, after talking with counsel, incidentally.

After his refusal, sometime after his refusal, one of the special investigators, to be exact the area supervisor, broke the door down. They broke the lock, your Honor. They didn't, as the Government at one point says in its brief, just push the door open.

The Government also admits that the door was locked and was closed. Mr. LaPerch, the area supervisor, broke the door down, as I say in one of the affidavits, or as Mr. Rosso says in his affidavit, we have a picture which we can show to your Honor indicating the broken lock.

The breaking down of this door and the entry into the storeroom was not only without consent of the owner-proprietor, but against his vehement protests, against protests of counsel.

A storeroom is not in a public area of the premises, although, again, in its memorandum the Government indicates that it is convenient to and adjacent to the ballroom. It is approximately seventy-five feet from the entrance to the ballroom, and probably a lot more from the interior, because the entrance is the closest point to the storeroom. It is separated by a kitchen, a large lobby, lavatory facilities, office facilities and the like from the ballroom.

Thus the essential facts of the situation are that Governmental agencies without a warrant, against the protest, against the will and without the consent, broke into the storeroom and removed certain property.

Frankly, I think those are the only essential facts under SEE and Camara that need be considered, although, as I said, we go at length into them, all the facts.

Based on SEE and Camara, on Frisch in the Fifth Circuit, on Hughes against Johnson in the Ninth and on U. S. against Pizzarello in the Second, I believe that this was an unreasonable search, one proscribed by the Fourth Amendment.

The Court: Is there any criminal prosecution pending against—

Mr. Stember: Not at this time, your Honor. We have been advised that dependent upon the result of chemical checks there will be criminal prosecution. The statute provides for criminal penalties.

I would like to say one more thing in that connection: The investigation has been characterized as a routine investigation by the Government. As set forth by Mr. Rosso in his affidavit, he was advised by one of the investigators—and I believe it was Mr. LaPerch—that this was more than routine investigation, they were investigating something specific. I don't know what.

My arguments to the Court are addressed to the point that this is a routine investigation. If it is a criminal investigation I believe that there is no question whatsoever under other cases and SEE and Camera that the search is unreasonable, illegally, invalid, the property taken must be suppressed and returned or destroyed.

Under SEE and Camera, however, I believe, as I am sure your Honor knows, that in its review of the inspection procedures which had been approved for approximately 150 years prior to Camara and SEE, the Supreme Court has severely limited an inspection without a warrant and without consent.

As the Court says in both SEE and Camara, the reasoning in Camara applicable to residences is applicable to

businesses. The reasoning in both cases then comes to this: Under an inspection statute of whatever nature—and the inspection statutes in both cases, Camara and SEE, were very similar in their phraseology to the inspection statute in the ———— case—under an inspection statute of whatever nature where consent is not given get warrant before you make an inspection.

In Camara, because it is a residence, doubt is expressed as to whether or not it is necessary that access to the premises be first be refused before a warrant is obtainable. In Camara as in SEE they explain that a warrant will be more easily obtainable under an inspection statute and is the case under a criminal investigation or under any other type of inspection or search.

In SEE they took that caveat contained in Camara and said to these Governmental agents, if they had known about SEE, "If you suspect that you are going to find something at a place that you are going to inspect, and if you believe that consent may be denied to you once you go there without a warrant, and you don't want anything to happen to whatever it is that you think you may find if consent is refused and you must leave and you must then get your warrant and come back and find it gone, in such a case you get your warrant in advance of your inspection." And that is contained in SEE.

The Court: How many bottles were taken?

Mr. Stember: I can't answer that, your Honor. Thirty-odd?

Mr. Rosso: Fifty.

Mr. Steinmann: There were over fifty bottles taken, your Honor.

The Court: Well, the practice generally, as I understand it, in this Court is to hear motions to suppress at the time of the trial in the criminal case. Now, if there is—what is this, an indictment? Are you going to proceed by indictment if you proceed?

Mr. Steinmann: If there is to be a prosecution here, your Honor, which I think is indicated, then it would be by—

The Court: When are you going to finish your chemical analysis?

Mr. Steinmann: I have been informed that most of the analyses has been finished.

The Court: And does it indicate a violation?

Mr. Steinmann: It does, your Honor, a substantial number of the bottles were refilled.

Mr. Stember: Your Honor—

The Court: Well, I think the practice—am I correct that the practice has generally been to refer these to the trial Court?

Mr. Steinmann: That is the practice, your Honor. Motion to suppress are referred to the Court for decision at time of trial.

Mr. Stember: If your Honor please, I think the law is clear on the right of petitioner to bring this motion prior to indictment,

The Court: Oh, yes, you have that right.

Mr. Stember: And also for a reasonable reason—I'm sorry for a proper reason and an understandable one: Should the motion to suppress be denied prior to indictment, petitioner has a right to appeal it. Should the motion to suppress be denied subsequent to indictment and even before trial, petitioner does not have the right to appeal. It is not a final determination and is then confined to appealing the decision on the motion to suppress in combination with any appeal that may be filed as to the result of the trial.

I think that to force petitioner to await an indictment, to await a trial, would be very unfair to petitioner.

The Court: Is this the only evidence you have?

Mr. Steinmann: Your Honor, the bottles that were taken from the catering establishment are the evidence.

The Court: If this was suppressed you would be able to go ahead, I take it?

Mr. Steinmann: Well, if your Honor suppressed this evidence then our decision would be that we had no basis to prosecute.

Mr. Stember: I am advised by the special investigators that whether the motion—or I have been advised that whether the motion to suppress is granted or not, they are going ahead with their investigation, which I believe will require books and records, audits and things of that nature in connection with the alcohol tax.

The Court: All right. Well, let me hear from the Government now.

Mr. Stember: Surely.

Mr. Steinmann: Your Honor, I think that Mr. Stember has correctly stated the fact that there really are only a few facts that are important here, and they are that several of these agents entered the premises during business hours, that they requested permission to examine the contents of a locked storeroom; the permission was denied, and after some discussion they did enter the room forcibly and removed some of the contents.

Understandably Mr. Stember's characterization of the extraneous facts was prejudicial, and I think that I will leave it to your Honor to read the Government's statement in our memorandum, because I think it is a more accurate statement of what actually happened.

It is our position that it doesn't matter whether the storeroom was locked or open, that the only issue here is whether or not in the absence of consent Government agents acting under the authority of the statute that congress passed giving them the right to inspect—

The Court: Well, you concede there was no warrant?

Mr. Steinmann: There was no warrant.

The Court: You concede that it was locked?

Mr. Steinmann: The door was locked.

The Court: And that permission was refused, and they broke in and took the items?

Mr. Steinmann: That's correct.

The Court: Do you want a hearing on anything further?

Mr. Stember: No, your Honor, if those are the facts that are being considered I don't see any necessity for a hearing.

The Court: You will go on without a further hearing?

Mr. Stember: Yes, your Honor.

The Court: All right, go ahead.

Mr. Steinmann: It's the Government's position, your Honor, that it is irrelevant whether that door was locked or not. I think that Mr. Stember is right again when he says that the cases that are important here, or the case that is important, is SEE. Frisch and Hughes and the other cases that he cited are distinguishable, I think, and I can distinguish them for your Honor if your Honor wishes, but I don't think that they are particularly applicable.

The question is whether or not SEE governs this situation. In SEE there was a locked commercial warehouse. The agents or the fire inspectors there asked to be admitted to inspect for fire violations, and the permission was refused.

The situation is entirely different here. This is an establishment that was open, there was a Bar Mitzvah in progress, people were being served alcoholic beverages. These were business hours.

The Court: Your agents weren't related to the families involved, were they? They hadn't been invited?

Mr. Steinmann: Not this particular weekend, your Honor. Although, I might add, just as background, since Mr. Stember has implied otherwise, that the way this inspection came about was that one of these very agents was

at a Bar Mitzvah there the weekend before, and he saw what looked to him to have been refilled bottles, and so he went and he put in a routine complaint, which was being acted on this following Saturday.

Mr. Stember: Did he drink any of the liquor, sir?

Mr. Steinmann: I think he did. In any event, in SEE it was a closed warehouse, it was off somewhere, there was nothing going on on the premises, it was locked.

In this case the establishment was open, there was a Bar Mitzvah in progress, the agents had to—

The Court: It's not like a restaurant, is it?

Mr. Steinmann: It's a catering—

The Court: I know, but the public isn't invited to enter?

Mr. Steinmann: Well, I think the people who were there were the public. I think the statute specifies that the agents have the authority to enter these kinds of establishments during business hours for the purpose of inspecting for violations of the alcohol laws.

The Court: Well, do you concede that this was a Bar and grill?

Mr. Stember: No, your Honor, this is a catering establishment.

The Court: No, I say if it were a bar and grill what is the law, as you understand it?

Mr. Stember: Well, I—

The Court: I want to understand what the case is about.

Mr. Stember: I distinguish between the public areas of a bar and grill, although SEE apparently may be cited as authority for the fact that if consent is refused to go into the public areas of a bar and grill, the agent needs a warrant.

However, that's not important to my case, because we gave them consent to examine the public areas.

The Court: Oh, you did?

Mr. Stember: Yes, your Honor. They went into the ballroom. Our managers were there. Our banquet manager was there in the ballroom.

The Court: I see.

Mr. Stember: We had no brief with their examination of the ballroom. The liquor was there, they could have examined it, we permitted them to.

May I—just one more thing, and then I will sit down: Camara says that the fact that you have let them into the public areas doesn't necessarily give them the right to get into the private areas.

Mr. Steinmann: Your Honor, I'd answer that by saying that the petitioner isn't claiming that the agents had no right to enter at all. And I don't think petitioner is claiming that had there been a lack of consent the agents wouldn't have had the right to examine the public areas.

Mr. Stember: I said that that is not important to my client's case and therefore I am not arguing the point.

Mr. Steinmann: Well, I suggest that it is important, your Honor, and I suggest that the issue on which this case turns is whether or not the fact that the storeroom was locked makes this a SEE case rather than some other kind of case, and the Government position is that it doesn't.

If this place was open, if they were serving liquor, if it was during business hours, then the agents here had the authority to go in and examine for violations of the law.

Now, it's true that the door was locked and the door was forced, but as I said, that just isn't the point.

The Court: Well, do you think I ought to decide this now?

Mr. Steinmann: I'd frankly prefer your Honor to think about it.

The Court: Well, I don't mean off the Bench. No, I mean before a possible indictment is handed down.

Mr. Steinmann: I would suggest not, your Honor. There are a lot of steps that take place between the seizure of liquor and whatever indictment might come down. I think that probably the proper procedure would be to await

either the return of an indictment of the lack of that return.

The Court: What about this point, is that right, that they can appeal from an adverse decision before an indictment, and not after?

Mr. Steinmann: That's not correct to my knowledge, your Honor.

The Court: I just don't know.

Mr. Stember: I make that representation to your Honor. I investigated that and it is the law in this Circuit.

Mr. Steinmann: Your Honor, if I may perhaps I can get at something that underlies the whole issue, and that is simply that if petitioner is found to have refilled these bottles that information will be communicated to the State Liquor Authority, and on the basis of that it is almost guaranteed that petitioner will lose its license.

The Court: Well, not if it is illegally obtained evidence. There is a question about whether the State can proceed on illegally-obtained evidence.

Mr. Steinmann: Well, of course—

The Court: I am not concerned with it anyway.

Mr. Steinmann: I think that the motion here is premature.

The Court: All right.

Mr. Stember: Your Honor, I would like to emphasize that I think that this motion is not premature. I would like to emphasize that untold hardship can result if this evidence in fact is illegally taken evidence.

The Court: Yes.

Mr. Stember: If it is evidence.

The Court: Well, an indictment against a going business can be hard. Let me consider the briefs, check on this appeals point, would you please, and let me know.

Mr. Steinmann: I will.

The Court: All right, the decision is reserved.

Mr. Stember: If there is anything to the contrary, would you let me know, as well as—

The Court: Yes, communicate to me, with a copy of the letter to defendant.

Mr. Stember: Because I did have it researched prior to bringing this proceedings, your Honor, and found clearly that the law was as I said it was.

The Court: All right, decision reserved.

Mr. Stember: Oh, your Honor, may I ask one more thing: That the Government undertake on the hearing on the show cause order to see to it that nothing further is done with the evidence whatsoever pending decision on the motion.

The Court: No, they can go ahead with their chemical analysis.

Mr. Stember: Right, but the point is—I have no objection to going ahead with the chemical analysis, but I do object to an attempt to communicate any of the facts to anybody that may see them until such time as your Honor's decision may come down and the reasonable time thereafter.

The Court: That's reasonable, I think. Don't you?

Mr. Steinmann: Your Honor, there is no indictment, although this would be an information, your Honor, incidentally—it's a misdemeanor.

The Court: Oh, would it be an information?

Mr. Steinmann: I have no information pending, and I can assure your Honor that I won't file one until this motion is decided. But—

The Court: All right, but you can continue with your examinations.

Mr. Steinmann: That's correct.

Your Honor, I don't know what the procedure is at the Internal Revenue Service with regard to notifying other agencies that might be interested in this. They may well send a letter off to the State Liquor Authority based on the chemical analysis. I just don't know what they will do.

The Court: Well, they have analyzed it already?

Mr. Steinmann: It has been analyzed already.

Mr. Stember: If your Honor please, this was one of the very points that I believe was covered when the Government undertook on behalf of the Internal Revenue Service as well as itself to see to it that nothing further was done to the prejudice of Colonnade.

The Court: Did you enter into a stipulation?

Mr. Stember: I beg your pardon?

The Court: Did you enter into—

Mr. Stember: This was in open Court, your Honor.

Mr. Steinmann: Your Honor, this was in open Court before Judge Rosling. He asked me to assure that nothing would be done until your Honor had heard the motion, and I assured him that would be the case. Now, your Honor has heard the motion.

Mr. Stember: I am asking them to discontinue until such time as your decision will come down and a reasonable time thereafter.

The Court: All right, I will continue that stay of Judge Rosling's.

Mr. Steinmann: It was not a stay, your Honor. He specifically struck a stay provision from the petitioner's order. He asked me informally.

But your Honor, petitioner is asking for a stay that would include having the Government prevent it from writing a letter. I think that's rather a drastic action.

Mr. Stember: Concerning the evidence which is before the Court, the question which is before the Court at this time, your Honor. I don't think that's drastic at all.

Mr. Steinmann: These are routine communications, your Honor. If the evidence is not to be used in a State proceeding, then I think if the State proceeding were to arise that would be the time to determine that, not on an oral petition for a stay as part of an application for a motion that the Government feels is premature.

Mr. Stember: Your Honor, the stay provision in the petitioner's papers was struck because of the Government's

undertaking as the U. S. Attorney stated. To partially decrease the weight of that I think is very prejudicial. The Government did not oppose the issuance of the stay, your Honor, when the application was made.

The Court: Well, I am not concerned with that problem.

Mr. Steinmann: We certainly did.

The Court: As I said a moment ago, I don't want any communication made of the results of the chemical analysis until I have decided the motion or you make a motion before me to permit the Government to reveal this information.

You may continue your analysis and whatever other part of the investigation you want to continue, but if I am going to grant the motion I am not going to allow the delay to prejudice the defendant. I don't want to feel under pressure myself to decide it promptly if it requires a good deal of consideration that I think it does.

Mr. Steinmann: Well, I would suggest that in that case the issue isn't properly before your Honor. There is no application on paper for a stay such as this.

The Court: Doesn't have to be.

Mr. Steinmann: Were your Honor to suppress the evidence, I would suggest that that wouldn't prevent the Federal Government from transmitting the information that it had to the State Liquor Authority anyway.

The Court: No, I could suppress and require you to destroy all materials and not to use it as part of the suppression order, but I don't want you to make any communications until I have decided it, or if you find you want to make a communication you may move before me and I will reconsider it.

Mr. Stember: On notice, your Honor? Motion on notice?

The Court: Oh, yes, not ex parte, on notice.

Decision reserved.

(Whereupon, at this time, the motion was concluded.)

## Memorandum and Order of Weinstein, J.

[Same Title]

Appearances:

Jerome M. Stember, Esq., 350 5th Avenue, New York, New York 10001, Attorney for Petitioner

Joseph P. Hoey, United States Attorney for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201

David P. Steinmann, Assistant U.S. Attorney, Of Counsel

Weinstein, D.J.

Petitioner instituted this proceeding pursuant to Rule 41 of the Federal Rules of Criminal Procedure seeking the return of certain property and suppressing its use as evidence in any subsequent trial, hearing or proceeding. Because "the property was illegally seized without a warrant" (Rule 41(e)(1)) the motion must be granted.

The facts are undisputed. The petitioner, Colonnade Catering Corp., conducts a catering business and has a New York State liquor license. While a party was in progress, three Internal Revenue Service special investigators accompanied by a Nassau County policeman arrived at petitioner's premises at approximately 4:00 P.M. on May 18, 1968. (One of the Internal Revenue investigators, while a guest at petitioner's premises the previous week, had noted possible violations of the excise tax law.) They had no search warrant.

After looking around the ballroom (a search which led to no seizures and the legality of which is not in issue here), the investigators demanded that the petitioner's locked liquor storeroom—located approximately seventy-five feet from the entrance to the ballroom—be opened for

their inspection. Petitioner's president, the only person authorized to unlock the storeroom, refused. The investigators, who had been joined by the Internal Revenue Service area supervisor, forcibly broke into the storeroom and removed fifty-three bottles of liquor. No arrest was made then or since.

The government has thus conceded that there was no search warrant, no arrest and no consent to the search. Nevertheless, the government maintains that the search—and seizure incident thereto—were lawful because the premises were public and subject to inspection. We do not agree.

Except "in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court,* 387 U.S. 523, 528-29, 87 S. Ct. 1727, 1731 (1967). This case falls within none of these classes of exceptions.

The government argues that because the petitioner's premises were open to the public, the petitioner is not entitled to the protection afforded by the Fourth Amendment against a warrantless search. Objects not exposed for public view are fully protected against a warrantless search. In *Katz* v. *United States,* 389 U.S. 347 (1967), the Supreme Court rejected having the resolution of search and seizure problems turn on "whether or not a given 'area', viewed in the abstract, is 'constitutionally protected.'" "For," the Court declared, "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [ Citations omitted.] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U.S. at 351-52, 88 S. Ct. at 511 ("person in a telephone booth may rely upon the protec-

tion of the Fourth Amendment."). See also *Mancusi* v. *DeForte,* —— U.S. ——, ——, slip sheet p. 4 (1968) ("the Court's recent decision in *Katz* . . . makes it clear that capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion."). *United States* v. *Rabinowitz,* 339 U.S. 56 (1950), which approved a search of file cabinets, involved, unlike the case before us, a valid search warrant.

We need not decide whether a catering establishment which serves invited guests is properly characterized as "public." Under the *Katz* test, petitioner's locked storeroom, to which only the president had the key, must certainly be regarded as an area which petitioner sought "to preserve as private." It is entitled to constitutional protection. See also *United States* v. *Frisch,* 140 F. 2d 660 (5th Cir. 1944) (officers inspecting bar not entitled to break into upper floor where liquor stored); *cf. Wattenberg* v. *United States,* 389 F. 2d 853, 857-59 (9th Cir. 1968) (question of whether search of "open field" adjacent to one's house protected by the Fourth Amendment; Court found that under *Katz* test, the search was illegal because it constituted "an intrusion upon what the resident seeks to preserve as private").

The government contends that its agents were engaged in a routine examination and inspection of the premises, and, consequently, were not required to obtain a search warrant before proceeding. There is no question but that numerous sections of the Internal Revenue Code authorize inspections. See, *e.g.,* 26 U.S.C. §§7606(a), 5146(b). These sections do not authorize warrantless inspections in the absence of consent. In *Camara* v. *Municipal Court,* 387 U.S. 530, 87 S. Ct. 1727 (1967), which arose from a warrantless search of a private resident by city housing

investigators, the Supreme Court rejected the contention that the public interest requires that administrative searches be made without a warrant. While conceding that many desirable governmental policies require periodic inspection for their implementation, the Court nevertheless found that administrative searches "authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual." 387 U.S. at 534.

A companion case, *See* v. *City of Seattle,* 387 U.S. 541, 87 S. Ct. 1737 (1967), extended the reasoning of the *Camara* case to a warrantless inspection of a locked commercial warehouse. The Court saw "no justification for . . . relaxing Fourth Amendment safeguards" "merely because commercial rather than residential premises were the object of the police intrusions." 387 U.S. at 543. As it noted,

> The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant. Ibid.

Any doubt that an individual fully protected as to Fourth Amendment rights, even in a situation where the government has a right to inspect, was dispelled by the Supreme Court in its recent decision in *Mancusi* v. *DeForte,* —— U.S. ——, —— S. Ct. —— (1968). In a footnote, the Court pointed out (slip sheet p. 8, n. 11):

> The Court's opinion in Davis v. United States, 328 U.S. 582, does contain dicta to the effect that there

is a lesser right to privacy when government officials have a "right" to inspect the seized items. See, e.g., id., at 593. However, the only holding in Davis was that there had been a valid consent to the search; the case "did not involve a search warrant issue." See v. City of Seattle, 387 U.S. 541, n. 7.

The government has not made any showing justifying its failure to obtain a search warrant. As the Supreme Court pointed out in the *Camara* case: "If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." (387 U.S. at 539, 87 S. Ct. at 1736).

The motion of the Colonnade Catering Corp. for the return of the property seized by the government is granted. Anything obtained as a result of the search is suppressed.

So ordered.

Dated: Brooklyn, New York, June 28, 1968.

U.S.D.J.

**Opinion of Mansfield, D.J.**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 310—September Term, 1968.

(Argued February 12, 1969 Decided March 26, 1969.)

Docket No. 32817

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In the Matter of the Petition of

THE COLONNADE CATERING CORP.,

*Plaintiff-Appellee,*

—v.—

UNITED STATES OF AMERICA,

*Defendant-Appellant.*

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Before:

ANDERSON and FEINBERG, *Circuit Judges,*
and MANSFIELD, *District Judge.**

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Appeal from an order of the United States District Court for the Eastern District of New York, Weinstein, J., granting appellee, The Colonnade Catering Corp.'s petition for the suppression and return of certain of its property seized by agents of the Internal Revenue Service. Reversed and remanded.

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* Of the Southern District of New York, sitting by designation.

*Opinion of District Judge Walter R. Mansfield*

JEROME M. STEMBER, New York, N.Y., *for Appellee.*

CHARLES RUFF, Attorney, Department of Justice, Washington, D.C. (Joseph P. Hoey, United States Attorney, David P. Steinmann, Assistant United States Attorney, Eastern District of New York, and Richard L. Mays, Attorney, Department of Justice, Washington, D.C., on the brief), *for Appellant.*

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MANSFIELD, *District Judge:*

This appeal is taken by the Government pursuant to 18 U.S.C. §3731 from an order of the district court granting the petition of appellee Colonnade Catering Corporation ("Colonnade") for the suppression and return of 53 bottles containing alcoholic spirits and two funnels seized by agents of the Internal Revenue Service. We conclude that the search and seizure of the property was reasonable and accordingly reverse the decision below.

On the afternoon of Saturday, May 18, 1968, three Special Investigators of the Internal Revenue Service, accompanied by a Nassau County policeman, entered Colonnade's premises at approximately 4:00 P.M. Colonnade, which holds a New York State liquor license, operates a catering establishment, and at the time there was a party in progress in its ballroom where liquor was being served. The purpose of their visit was to determine whether Colonnade possessed any liquor bottles that had been refilled or altered, which would constitute a violation of both federal tax laws, 26 U.S.C. §5301(c) and New York's Alcohol Beverage Control Law, McKinney's Consol. Laws, 3-B,

§107-a and Rule 4 of the State Liquor Authority.[1] One of the agents had attended a party there on the previous Saturday and had observed what he thought were resealed bottles of liquor.

After looking around the ballroom with the manager's consent, the agents inspected the basement of the building without result and stated that they wished to enter a locked liquor storeroom located about 75 feet from the entrance to the ballroom. They were informed that Colonnade's president was the only person with authority to unlock the door; he was called to the scene but refused to do so. Instead he asked the agents if they possessed a warrant and, upon being told by the area supervisor of the Alcohol Tax Unit (who had meanwhile arrived) that according to statute they did not need one, he refused to unlock the door, whereupon the agents broke the lock, entered, and seized the liquor and funnels which are the subject of this petition.

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1. The federal statute provides in pertinent part that:

"*Refilling of liquor bottles.*—No person who sells, or offers for sale, distilled spirits, or agent or employee of such person shall—

"(1) place in any liquor bottle any distilled spirits whatsoever other than those contained in such bottle at the time of stamping under the provisions of this chapter; or

"(2) possess any liquor bottle in which any distilled spirits have been placed in violation of the provisions of paragraph (1); or

"(3) by the addition of any substance whatsoever to any liquor bottle, in any manner alter or increase any portion of the original contents contained in such bottle at the time of stamping under the provisions of this chapter; or

"(4) possess any liquor bottle, any portion of the contents of which has been altered or increased in violation of the provisions of paragraph (3); * * *."

Upon Colonnade's motion to suppress the evidence pursuant to Rule 41(e), F. R. Cr. P.,[2] the district court held that the warrantless search and seizure was in derogation of the right of Colonnade and its officers "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure." U.S. Const. Amend. 4. In his opinion Judge Weinstein concluded that the Supreme Court's recent decision in *Camara* v. *Municipal Court, of City and County of San Francisco,* 387 U.S. 523, 530, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) and *See* v. *City of Seattle,* 387 U.S. 541, 87 S. Ct. 1737 18 L. Ed. 2d 943 (1967), extending Fourth Amendment protection to administrative searches of the type there under attack, including a search of a commercial warehouse, precluded a warrantless search of Colonnade's liquor storeroom. The Government contends that the warrantless search in this case is to be distinguished from those before the Supreme Court there, and that search without a warrant was permissible here because it was authorized by statute, 26 U.S.C. §§5146(b) and 7606(a),[3] and the essential govern-

2. Rule 41(e), F. R. Cr. P., provides in pertinent part that:

"A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant. * * * If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial."

3. These sections provide:

26 U. S. C. §5146(b)

*"Entry of premises for inspection,*—The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued

mental purpose to be served would be frustrated if a warrant were required. See *Peeples* v. *United States*, 341 F. 2d 60 (5th Cir.), cert. denied, 380 U.S. 988, 85 S. Ct. 1362, 14 L. Ed. 2d 280 (1965); *United States* v. *Sessions*, 238 F. Supp. 746 (N. D. Ga. 1968) (following *Peeples* after the decisions in *Camara* and *See*); accord: *United States* v. *Duffy*, 282 F. Supp. 777 (S.D.N.Y. 1968) (dictum). Appellant further argues that in any event Colonnade, by engaging in the retail liquor business, impliedly consented to warrantless inspections of its business premises.

[1] The first question to be decided is whether the search here must be barred on the authority of *Camara* and *See*, which dealt with the legality of warrantless administrative searches conducted in aid of municipal code enforcement. In those decisions the Supreme Court concluded that where broad inspection authority is granted by statute to an administrative officer, the warrant procedure with its individualized review is required to assure that reasonable limits will be imposed upon the exercise of such authority in each instance and to protect the occupant against excessive intrusion upon his privacy, since he cannot be expected to know the lawful limits of the inspector's power. Furthermore, since the need to search in some cases might be questionable, a particular search might be unreasonable. However, the Supreme Court limited its decision to "administrative searches of the kind at issue here," *Camara*, *supra*, 387 U.S. at 534, 87 S. Ct. at 1733 (i.e., those conducted pursuant to broad grants of authority). Justice

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pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises."

26 U. S. C. §7606(a)

"*Entry during day.*—The Secretary or his delegate may enter, in the daytime, any building or place where any articles or object subject to tax are made, produced, or kept, so far as it may be necessary for the purposes of examining said articles or objects."

White, speaking for the majority in both cases, further observed that warrantless searches are permitted in "certain carefully defined classes of cases," and stated that the question of whether to require a warrant must depend "in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," *Camara, supra* at 533, 87 S. Ct. at 1733. With respect to a search of business premises, such as that involved here, the Court went further:

> "We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product." *See, supra,* 387 U.S. at 545-546, 87 S. Ct. at 1740.

Thus the door was left open to warrantless administrative searches in those special situations where protection against excessive intrusions upon the individual's privacy could be reasonably assured and the objectives demanded by the public interest would be frustrated if the inspectors were required to obtain warrants. We believe that for several reasons the limited search of a liquor licensee's storeroom by Internal Revenue Service agents falls within the limited exception contemplated by the Supreme Court. In the first place, the statutory grants authorizing the administrative searches in *Camara* and *See,* unlike those here, were extremely broad in scope. For instance, §503 of the San Francisco City Housing Code, which was the ordinance under consideration in *Camara,* gave city inspectors the power to enter "any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code." This included the duty (among others) of determining through periodic inspec-

tion whether conditions existed in "residential buildings, dwelling units and neighborhoods" that might be found to be "dangerous, substandard, insanitary or obsolete and deficient," San Francisco Housing Code §101; Part III, §86, San Francisco Municipal Code. In *See*, which involved an attempted inspection of a locked commercial warehouse, the authority was only slightly more restricted. The relevant statute provided for entry by the Fire Chief into buildings other than dwellings "as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards," Seattle Fire Code §8.01.050, 387 U.S. at 541, 87 S. Ct. at 1738. These expansive grants of authority would permit an inspector, unless a warrant was required, to roam at will through any portion of a dwelling house, in one case, or of commercial property, in the other, without the occupant or owner being able to determine the need for the inspection, its purpose and its lawful limits. Theoretically the inspection might seek to uncover any one or more of innumerable possible violations, such as faulty wiring, plumbing, foundations, beams, or the like. Without the safeguard of the warrant machinery, the inspectors could conduct a "general search" of the very type prescribed by the Fourth Amendment. As Justice White noted, "such broad statutory safeguards are no substitute for individualized review," 387 U.S. at 533, 87 S. Ct. at 1733.

[2] In contrast to such broad delegation of inspection authority, the statutory grants of inspection power here under review are carefully defined and narrowed to the point where they grant little, if any, more authority than that which would be extended in a warrant issued by a magistrate after review. The sole authority granted is permission, during business hours, to enter the premises of a dealer in liquor who is subject to a special federal

alcohol tax, 26 U.S.C. §5121(a),[4] for the limited purpose (not involved here) of inspecting those "records or other documents required to be kept by such dealer under this chapter" and the further limited purpose of inspecting "any distilled spirits, wines or beers kept by such dealer on such premises," 26 U.S.C. §5146(b), or to enter "any building or place where any articles or object subject to tax are made, produced, or kept, so far as it may be necessary for the purposes of examining said articles or objects," 26 U.S.C. §7606(a). The agent in the field is not, by virtue of these statutory provisions, given authority to conduct a general search of the premises; he is limited to the place where the liquor is kept and to inspection of specific objects, i.e., the alcoholic beverages. The scope of permissible intrusion without a warrant is thus carefully restricted and it does not entitle the agent to dispense with a warrant before searching the dwelling place of the owner of a retail liquor establishment, *United States* v. *Frisch*, 140 F. 2d 660 (5th Cir. 1944), or clothing belonging to such a person, *cf. Finn's Liquor Shop Inc.* v. *State Liquor Authority*, 31 A.D. 2d 15, 294 N.Y.S. 2d 592 (1st Dept. 1968).

The limited search permitted to be made by an alcohol tax inspector is also distinguishable in another significant respect from the searches reviewed in *Camara* and *See*. As was pointed out by Justice White, broad statutory authorizations of the type there under consideration pose the danger that in a confrontation with an administrative inspector claiming statutory authority to enter and inspect for possible housing or fire code violations, the homeowner or businessman may have "no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under

4. This section provides that:

"*Retail dealers in liquor.*—Every retail dealer in liquor shall pay a special tax of $54 a year. * * *"

proper authorization." 387 U.S. at 532, 87 S. Ct. at 1732. Such a risk, in the type of inspection involved here, is minimal. Dealers in liquor, unlike homeowners or businessmen conducting less specialized activities, are engaged in a heavily regulated business.[5] They are usually well aware of the regulations to which they are subject, and are undoubtedly familiar with the nature and limits of the inspector's authority. Cf. *Zap* v. *United States*, 328 U.S. 624, 66 S. Ct. 1277, 90 L. Ed. 1477 (1946). In fact it is their very knowledge of the possibility of such inspections that make the inspection program an effective means of enforcing the tax law. Such sophisticated licensees, when faced with an inspector whose authority to search is carefully restricted and circumscribed by regulations known to all, are undoubtedly acquainted with the limits upon the agent's inspection rights.

5. All states which permit the retail sale of liquor by private persons license this activity. A 1960 survey showed that, including the District of Columbia, 33 states had such licensing programs for sales at retail for consumption off the premises, while 17 operated under the state monopoly system. H. Levin, *Economic and Regulatory Aspects of Liquor Licensing*, 112 U. Pa. L. Rev. 785, Table 1 at 786 (1964) [Derived from Joint Committee of the States to Study Alcoholic Beverage Laws, *Alcoholic Beverage Control* (rev. ed. 1960)]. No state permits the sale of alcoholic beverages for consumption on the premises without a license. The mass of state and federal legislation regulating this industry is collected and annoted in *CCH Liquor Control Law Rep.* (9 vols.).

The regulatory laws of many states, including those of New York, to which Colonnade is subject, provide for warrantless inspections of the type authorized by the federal statutes here. E.g., 3 McKinney's Consol. Laws of New York Ann. §106(15); 35 Alaska Compiled Laws Ann. §35-4-15(6); Ark. Statutes, Ch. 48, §48-203(d); 30 Conn. Gen. Statutes Ann. §30-6; Fla. Statutes, Ch. 562, §562.031, F.S.A.; 43 Ill. Ann. Statutes §112 subd. 2; Kansas Statutes Ann. Ch. 41, §41-209 (5); 26 La. Rev. Statutes §378; 2B Ann. Code of Md. §190; Ann. Laws of Mass. Ch. 138, §24; Rev. Statutes of Neb. Ch. 53, §53-117; 33 N. J. Statutes Ann. §33:1-23; 37 Okl. Statutes §514(9); 47 Penn. Statutes Ann. §2-209; 7 Vt. Statutes Ann. §564.

[3] For the foregoing reasons the imposition of a requirement that alcohol tax inspectors obtain warrants before carrying out the specifically defined inspection authorized by statute would serve no useful purpose in protecting the Fourth Amendment rights of the liquor dealer. Those rights are already protected by the restrictions contained in the statute itself. We are not dealing here with "area" or "general" searches of the type authorized by municipal codes, and there is no need to utilize the warrant machinery as a means of establishing standards for protection against unwarranted intrusions possible under such codes. Here the area eligible for inspection is clearly and narrowly defined; the purpose is relevant; the scope is limited; and all of these aspects are well known to the operator of the premises being inspected. Nothing of consequence therefore would be achieved through individualized review by a magistrate. In the proper exercise of his discretion, the magistrate would be compelled to issue a warrant as a matter of course, duplicating the limited authority already granted by statute. In short, the statute here under consideration is the equivalent of a warrant.

There remains the question of whether the public interest in alcohol tax inspections would be hindered or prejudiced in any way by warrant procedure, even if all that it involved were the automatic issuance of "rubber stamp" warrants. The public interest in such periodic inspections is hardly open to question. It derives from the potentially great loss to the national revenue which would result from ineffective enforcement of the alcohol tax law. In the fiscal year 1966, for instance, over $3 billion was collected in excise taxes on distilled spirits. The Annual Report of the Commissioner of Internal Revenue (1967), p. 117. A common method of evading such taxes by retailers who sell liquor by the drink is the illegal refilling of bottles in violation of 26 U. S. C. §5301(c). The goal of the inspection is

to deter such violations. An important factor in achieving that goal is the element of surprise. As experience and efforts to enforce the Eighteenth Amendment so frequently revealed in the 1920's, the liquor dealer-violator who receives an advance tipoff of an imminent inspection destroys the evidence before the agent arrives on the scene. Although the dealer knows that he may be visited by inspectors, the effective implementation of the law depends upon his being kept in the dark as to the precise time of the visit. If, as the Supreme Court indicated in *Camara,* "warrants should normally be sought only after entry is refused," 387 U.S. at 539, 87 S. Ct. at 1736, the cat would be let out of the bag in most instances where a violation was being committed and the essential governmental purpose would be frustrated. Warned of the inspection the dealer would quickly destroy or otherwise dispose of the contents of the illegally filled bottles before the inspector returned with his warrant. In this respect the result would differ radically from that presented in municipal code enforcement of the type at issue in *Camara* and *See,* where a delay attendant upon obtaining a warrant might be helpful in achievement of the public interest goals, since the violator might be induced to eliminate the hazard before the inspector's return. Here the effect will be to enable the dealer to escape payment of taxes constituting an essential part of the revenue; and it may be expected that if such a dealer could escape detection, he would repeat the violations with impunity.

We further conclude that an inspection of the type here under review may be lawfully conducted without a warrant for the reason that the retail liquor dealer, upon obtaining his state license and his federal occupational stamp, enters this highly regulated business with a full awareness and expectation that his liquor supply, including that located in "places of storage," 26 U. S. C. §5146(b), will be inspected by representatives of the Treasury Department.

Whether his conduct in entering the business upon such a condition be labelled an implied consent to such an inspection, cf. *Zap.* v. *United States,* 328 U. S.624, 66 S. Ct. 1277 (1946), or a limited dedication to public inspection of that portion of his premises in which his liquor supply is stored, it is clear that he anticipates that such an inspection will be made and he is well aware of the need for such inspection. The situation is substantially the same as if the dealer had knowingly entered into a contract waiving his right to privacy in those areas where he keeps and sells alcoholic beverages. Such a waiver with respect to subject matter in which the public has a special interest would be enforceable, *Zap* v. *United States,* 328 U. S. 624, 66 S. Ct. 1277 (1946); see *Shapiro* v. *United States,* 335 U. S. 1, 68 S. Ct. 1375, 92 L. Ed. 1787 (1948), and is to be distinguished from unrelated waivers, cf. *Garrity* v. *New Jersey,* 385 U. S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 5621 (1966); *Spevack* v. *Klein,* 385 U. S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967), which have been nullified on the ground that such conditions would constitute an unreasonable forfeiture of the citizen's constitutional rights. It does not strike us as unreasonable to require that a liquor dealer, as a condition to entry into a business in which the Government has such a direct and special interest, submits himself to statutory authority to the extent of permitting warrantless inspection of alcoholic beverages on his business premises. In the face of such extensive regulatory measures, the dealer can hardly contend with any degree of conviction that he has a "reasonable expectation of freedom from governmental intrusion" into his bar and liquor storage space, *Mancusi* v. *DeForte,* 392 U. S. 364, 84 S. Ct. 2120, 20 L. Ed. 2d 1154 (1968); *Katz* v. *United States,* 389 U. S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). In this respect his status differs sharply from that of the homeowner in *Camara* or the operator of a commercial warehouse in *See,* neither of whom could have been

expected to have familiarity with the city inspectors' inspection powers under the broad municipal codes there involved. In contrast, the liquor dealer is well aware of the limits of the alcohol tax inspector's authority. To require him to execute an express advance agreement authorizing periodic inspections without warrant would be a superfluous gesture in view of their general awareness of the likelihood of periodic surprise inspections. His situation is comparable to that of the traveler who anticipates a border search of his baggage upon entry into the United States, 19 U. S. C. §§1467, 1496, 1582, a coal mine operator who expects to be inspected by the Secretary of Interior, 30 U. S. C. §§451-454, or an air carrier which is aware of the prospect that its lands, buildings and equipment will be inspected by the C. A. B., 49 U. S. C. §1377. The constitutionality of statutes authorizing such limited warrantless searches in the public interest is generally recognized, *Landau* v. *United States Attorney for the Southern District of New York*, 82 F. 2d 285 (2d Cir. 1936), and the additional imposition of warrant procedure would not serve any useful purpose.[6]

6. Many other federal statutory provisions permit warrantless inspections. E.g., 42 U. S. C. §2051 (inspection of places where research in atomic energy is performed by A. E. C.); 46 U. S. C. §408 (inspection of vessel boiler plates at manufacturer's plant by Coast Guard); 21 U S. C. §§603, *et seq.* (inspection of meat and meat products by Secretary of Agriculture); 42 U. S. C. §262 (inspection of establishments engaged in the preparation of certain kinds of drugs by the Public Health Service); 15 U. S. C. §1270 (inspection of any factory or warehouse in which "hazardous substances" are manufactured, processed, packed, or held for introduction into commerce and of any vehicle being used to transport or hold such substances by the Secretary of Health, Education and Welfare); 21 U. S. C. §157 (inspection of any establishment engaged in the production of certain types of drugs for the treatment of animals by the Secretary of Agriculture); 21 U. S. C. §374 (inspection of any establishment where food, drugs, devices or cosmetics are manufactured, processed, packed or held for introduction into commerce by the Secretary of Health Education and Welfare).

Having concluded for the foregoing reasons that the search of Colonnade's liquor storeroom conducted by the representatives of the Internal Revenue Service pursuant to 26 U.S.C. §§5146(b) and 7606(a) was not rendered unreasonable by the fact that it was conducted without a warrant, we turn to Colonnade's contention that the decision below should be affirmed on the ground that the search was unreasonable.

[4, 5] Colonnade contends that two factors in this case compel affirmance. First, it is argued that the fact of the agents' forcible entry into the liquor storeroom rendered the search "per se" unlawful. However, a search reasonably conducted pursuant to a search warrant is not rendered unreasonable by the use of force in its execution, if the prerequisite of announcement of authority and purpose is fulfilled, 18 U. S. C. §3109; the same standard applies to arrests without a warrant, *Sabbath* v. *United States,* 391 U. S. 585, 88 S. Ct. 1755, 20 L. Ed. 2d 828 (1968), and we see no rational basis for applying a different standard of conduct to warrantless searches. In short, where it is reasonable to conduct a search without a warrant, it is accordingly reasonable to use whatever minimal force is necessary to carry out the search, provided, as is the case here, that the authority of the agent to make the search and the purpose of the entry is announced, and consent to entry is not forthcoming. There would be no point in holding warrantless searches by alcohol tax inspectors to be reasonable if the owner of the premises could render them unreasonable by withholding his consent and compelling the agent to use the minimum amount of force necessary to accomplish his objective.

Second, it is strenuously urged by Colonnade that the search here was unreasonable because the Internal Revenue Service had some basis for believing that evidence of a violation of 26 U. S. C. §5301(c) could be found on the

premises. Thus, it argues, although a routine "administrative" search might be reasonable, the existence of some ground for the search renders it a search pursuant to a "criminal investigation" for which a warrant should be required.[7] In point of fact, of course, any inspection or search conducted by an agent for possible alcohol tax violations could be characterized as a search pursuant to a criminal investigation. Whether or not he has cause to believe that evidence of any such violations will be found, the purpose of the inspection will be to determine, by testing the contents of liquor bottles, whether the business is being conducted lawfully or unlawfully.

[6] Acceptance of defendant's contentions would place the agent in the position of being authorized to conduct a warrantless search only when he had no reason to suspect a possible violation. If, as *Camara* suggests, the withholding of consent forms a basis for a reasonable belief that evidence of a violation can be found, see p. 203 *supra*, a warrant would be required whenever consent was not given, and the public interest in reasonable warrantless searches would be frustrated. We conclude, therefore, that warrantless searches pursuant to the limited statutory authority of 26 U. S. C. §§5146(b) and 7606(a) for the purpose of investigating possible violations of 26 U. S. C. §5301(c) are reasonable within the meaning of the Fourth Amendment, whether or not there is a reasonable basis for believing that evidence of such violations may be found on the premises searched.

Accordingly, the decision of the lower court is reversed and the case remanded to the district court for the purpose of entering an order denying the petition of Colonnade for the suppression and return of property.

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7. Violation of 26 U. S. C. §5301(c) is punishable by a fine of not more than $1,000, or imprisonment for not more than one year, or both. 26 U. S. C. §5606.

# Supreme Court of the United States

*No.* 108 ---- , *October Term, 19* 69

The Colonnade Catering Corp.,

Petitioner,

v.

United States

ORDER ALLOWING CERTIORARI. Filed October 13 ----- , 19 69.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second ---------- Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office-Supreme Court, U.S.
FILED
MAY 13 1969
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

October Term, 1968

No. [redacted] 108

THE COLONNADE CATERING CORP.,
*Petitioner,*

*against*

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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# TABLE OF CONTENTS


| | PAGE |
|---|---|
| OPINIONS BELOW | 2 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 2 |
| CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED | 3 |
| Fourth Amendment | 3 |
| 18 U.S.C. §3731 | 3 |
| 26 U.S.C. §5121(a) | 4 |
| 26 U.S.C. §5146(b) | 4 |
| 26 U.S.C. §7342 | 4 |
| 26 U.S.C. §7606(a) | 5 |
| Rule 41(e) of the Federal Rules of Criminal Procedure | 5 |
| STATEMENT OF THE CASE | 5 |
| REASONS FOR GRANTING THE WRIT | 8 |
| I. The forcible breaking and entering by agents of the Internal Revenue Service into the locked liquor storeroom of the petitioner (a caterer with a federal retail dealer's occupational tax stamp), and the warrantless search of this storeroom and seizure from it of a quantity of bottled liquor violated the Fourth Amendment | 8 |
| II. The United States Court of Appeals for the Second Circuit did not have jurisdiction to hear the appeal in this case under 18 U.S.C. §3731 as amended by section 1301 (a) of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 237 | 22 |
| CONCLUSION | 23 |

PAGE

APPENDICES:

APPENDIX I—Opinion of District Judge Walter R. Mansfield for the Second Circuit ..... 1a

APPENDIX II—Memorandum and Order of June 28, 1968 of District Judge Jack B. Weinstein 18a

## TABLE OF AUTHORITIES

*Cases:*

Alderman v. United States, 37 U.S.L. Week 4189 (March 10, 1969) ..... 9

Berd v. Lovelace, Cary 62, 21 Eng. Rep. 33 (1576-1577) ..... 20
Berger v. New York, 388 U.S. 41 (1967) ..... 18
Boyd v. United States, 116 U.S. 616 (1886) ..... 17

Camara v. Municipal Court, 387 U.S. 523 (1967) .....10, 11

Davis v. Mississippi, 37 U.S.L. Week 4359 (April 22, 1969) ..... 19
Dennis v. Codringham, Cary 100, 21 Eng. Rep. 53 (1579-1580) ..... 20

Entinck v. Carrington, 2 Wils, K. B. 275, 291, 95 Eng. Rep. 807, 817, 818 (1765) .....15, 17

Frank v. Maryland, 359 U.S. 360 (1959) .....10, 11, 20

Gardner v. Broderick, 392 U.S. 273 (1968) ..... 20
Garrity v. New Jersey, 385 U.S. 493 (1967) ..... 21
Griswold v. Connecticut, 381 U.S. 479 (1965) ..... 19
Groban, In re, 352 U.S. 330 (1957) ..... 16

Jackson, Ex parte, 96 U.S. 727 (1877) ..... 19
Jones v. United States, 362 U.S. 257 (1960) ..... 19

PAGE

Katz v. United States, 389 U.S. 347 (1967) .....8, 9, 18, 19
Kelway v. Kelway, Cary, 89, 21 Eng. Rep. 47 (1579-1580) ..... 20

Lady Ivy's Trial, 10 How. St. Tr. 555 (1684) ..... 20

Mancusi v. DeForte, 392 U.S. 364 (1968) ..... 9
Mapp v. Ohio, 367 U.S. 643 (1961) ..... 18

Olmstead v. United States, 277 U.S. 438 (1928) .....18, 19

Paxton's Case ..... 16
People ex rel. Attorney General v. Lansing Municipal Judge, 327 Mich. 410, 42 N.W. 2d 120 (1950) ..... 21

Rios v. United States, 364 U.S. 253 (1960) ..... 19
See v. City of Seattle, 387 U.S. 541 (1967).....10, 11, 12, 19, 21, 23

Semayne's Case, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (1603) ..... 13
Shapiro v. United States, 335 U.S. 1 (1948) ..... 22
Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) ..... 19
Spevack v. Klein, 385 U.S. 511 (1967) .....21, 22
Stanley v. Georgia, 37 U.S.L. Week 4315 (April 7, 1969) ..... 19
Stoner v. California, 376 U.S. 483 (1964) ..... 19

Uniformed Sanitation Men v. Comm'r of Sanitation, 392 U.S. 28 (1968) ..... 21
United States v. Frisch, 140 F.2d 600 (5th Cir. 1944) 11
United States v. Stanack Sales Co., 387 F.2d 849 (3d Cir. 1968) ..... 21

Wattenberg v. United States, 388 F.2d 853 (9th Cir. 1968) ..... 19
Wolf v. Colorado, 338 U.S. 25, 27 (1949) ..... 18

Zap v. United States, 328 U.S. 624 (1946) ..... 21

PAGE

***United States Constitution:***

Fourth Amendment ..... 3, 8, 10, 17, 19, 21
Fifth Amendment ..... 22

***Statutes:***

18 U.S.C. §3731 ..... 3, 7, 22
26 U.S.C. §5121(a) ..... 4
26 U.S.C. §5146(b) ..... 4, 8, 20
26 U.S.C. §7342 ..... 4, 20
26 U.S.C. §7606(a) ..... 5, 8, 20
28 U.S.C. §1254(1) ..... 2

***Other Authorities:***

1 Brougham, *Historical Sketches of Statesmen Who Flourished in the Time of George III* 42 (1858) ..... 13-14
3 Coke, *Institutes* *162 ..... 13
4 Coke, *Institutes* *176-*77 ..... 14
2 Hale, *The History of the Pleas of the Crown* 113 ..... 14
3 May, *Constitutional History of England* 6, 7 (7th ed. 1882) ..... 15
8 *Old South Leaflets* 57 (No. 179) ..... 17
Rogge, *Inquisitions by Officials: A Study of Due Process Requirements in Administrative Investigations*—I, 47 Minn. L. Rev. 939 (1963); II, 48 Minn. L. Rev. 557 (1964); III, 48 Minn. L. Rev. 1081 (1964) ..... 13
Tudor, *Life of James Otis*, 63 (1823) ..... 16
Wilkes, *North Britain*, No. 45 ..... 14
2 *The Works of John Adams* App. 523, 524 (Chas. Francis Adams ed. 1850) ..... 16

IN THE

# Supreme Court of the United States

**October Term, 1968**

**No.** .....

THE COLONNADE CATERING CORP.,
*Petitioner,*

*against*

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, The Colonnade Catering Corp., prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the office of the clerk of that court on March 26, 1969.

## Opinions Below

The United States Court of Appeals for the Second Circuit rendered an opinion written by District Judge Walter R. Mansfield, of the Southern District of New York, sitting by designation. It is reproduced as Appendix I, *infra*, pp. 1a-17a. This opinion is not yet reported.

The United States Court of Appeals for the Second Circuit reversed a memorandum and order of June 28, 1968 of District Judge Jack B. Weinstein of and for the United States District Court for the Eastern District of New York, granting the petitioner's request for the return of a quantity of its bottled liquor seized by agents of the Internal Revenue Service. Judge Weinstein's memorandum and order are reproduced as Appendix II, *infra*, pp. 18a-23a. His memorandum was not reported.

## Jurisdiction

The United States Court of Appeals for the Second Circuit entered its judgment on March 26, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## Questions Presented

1. Did the forcible breaking and entering by agents of the Internal Revenue Service into the locked liquor storeroom of the petitioner (a caterer with a federal retail liquor dealer's occupational tax stamp), and the warrantless search of this storeroom and seizure from it of

a quantity of bottled liquor violate the Fourth Amendment?

2. Did the United States Court of Appeals for the Second Circuit have jurisdiction to hear the appeal in this case under 18 U.S.C. §3731, as amended by section 1301(a) of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 237?

## Constitutional, Statutory and Other Provisions Involved

### Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### 18 U.S.C. §3731

#### Appeal by United States

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

* * *

From an order, granting a motion for return of seized property or a motion to suppress evidence, made before the trial of a person charged with a violation of any law of the United States, if the United States attorney certi-

fies to the judge who granted such motion that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of the charge pending against the defendant.

**26 U.S.C. §5121(a)**

**Imposition and rate of tax**

**(a) Retail dealers in liquors.** Every retail dealer in liquors shall pay a special tax of $54 a year. * * *

**26 U.S.C. §5146(b)**

**Preservation and inspection of records, and entry of premises for inspection**

* * *

**(b) Entry of premises for inspection.**—The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises.

**26 U.S.C. §7342**

**Penalty for refusal to permit entry or examination**

Any owner of any building or place, or person having the agency or superintendence of the same, who refuses to admit any officer or employee of the Treasury Department acting under the authority of section 7606 (relating to entry of premises for examination of taxable articles)

or refuses to permit him to examine such article or articles, shall, for every such refusal, forfeit $500.

**26 U.S.C. §7606(a)**

**Entry of premises for examination of taxable objects**

(a) **Entry during day.**—The Secretary or his delegate may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects.

**Rule 41(e) of the Federal Rules of Criminal Procedure**

**Search and Seizure**

* * *

(e) **Motion for return of Property and to Suppress Evidence.** A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant. * * *

## Statement of the Case

The petitioner initiated this proceeding under Rule 41(e) of the Federal Rules of Criminal Procedure in the United States District Court for the Eastern District of New York, District Judge Weinstein presiding, for the re-

turn to it of some bottled liquor which agents of the Internal Revenue Service illegally seized from its locked liquor storeroom after a warrantless and forcible entry without its consent, as well as over its objections. District Judge Weinstein in a memorandum and order of June 28, 1968 granted the petitioner's motion for the return of its illegally seized property. In two paragraphs of his memorandum he stated the facts:

> The facts are undisputed. The petitioner, Colonnade Catering Corp., conducts a catering business and has a New York State liquor license. While a party was in progress, three Internal Revenue Service special investigators accompanied by a Nassau County policeman arrived at petitioner's premises at approximately 4:00 P.M. on May 18, 1968. (One of the Internal Revenue investigators, while a guest at petitioner's premises the previous week, had noted possible violations of the excise tax law.) They had no search warrant.
>
> After looking around the ballroom (a search which led to no seizures and the legality of which is not in issue here), the investigators demanded that the petitioner's locked liquor storeroom—located approximately seventy-five feet from the entrance to the ballroom—be opened for their inspection. Petitioner's president, the only person authorized to unlock the storeroom, refused. The investigators, who had been joined by the Internal Revenue Service area supervisor, forcibly broke into the storeroom and removed fifty-three bottles of liquor. No arrest was made then or since (App. II, pp. 18a-19a).*

These facts come from the petitioner's affidavits, and a statement to District Judge Weinstein during the course of

---

* The appendices to the petition for certiorari will be referred to as App. I or App. II, as the case may be. The government's appendix in the Second Circuit will be referred to as A.

argument before him (A. 28). The government's conclusory affidavit, by an assistant United States attorney without any personal knowledge of the facts, contains nothing, as this paragraph from it demonstrates:

> The facts of this case and the law governing these facts are fully set forth in the Government's Memorandum of Law which is submitted herewith. Upon information and belief and after conversations with the Special Investigators involved in this case, it is submitted that the inspection, examination and seizure here complained of were authorized by statute and were lawful in all respects (A. 14).

After Judge Weinstein's memorandum and order of June 28, 1968, the government took the case to the Second Circuit. Both parties as well as the Second Circuit treated this appeal as if it were under 18 U.S.C. §3731, as amended by section 1301(a) of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 237. The government stated in its brief in the Second Circuit:

> This is an appeal by the United States under the provision of 18 U.S.C. §3731[1], ([1]As amended by the Omnibus Crime Control and Safe Streets Act of 1968 (P.L. 90-351), Title VIII, Section 1301 (62 Stat. 844).) * * * (at p. 3)

The petitioner in its brief agreed (at p. 4). District Judge Mansfield began his opinion for the Second Circuit this way:

> This appeal is taken by the government pursuant to 18 U.S.C. §3731 * * * (App. I, p. 2a).

It is the petitioner's position here that no appeal lay under 18 U.S.C. §3731, even as amended.

The Second Circuit reversed District Judge Weinstein on the ground that 26 U.S.C. §§5146(b) and 7606(a) providing for administrative inspections by representatives of the Treasury Department resulted in an advance waiver of petitioner's rights under the Fourth Amendment. The petitioner takes the position that these statutory provisions are not susceptible of such a construction; and that if they are, then they themselves would violate the Fourth Amendment.

## Reasons for Granting the Writ

### I. The forcible breaking and entering by agents of the Internal Revenue Service into the locked liquor storeroom of the petitioner (a caterer with a federal retail dealer's occupational tax stamp), and the warrantless search of this storeroom and seizure from it of a quantity of bottled liquor violated the Fourth Amendment.

In accordance with the spirit of our law, embodied in constitutions and bills of rights, we guarantee to the individual a certain area, physical as well as mental, that is free from intrusion by the government. The Fourth Amendment is part of this guarantee.

As the Court stated through Mr. Justice Stewart in *Katz* v. *United States,* 389 U.S. 347 (1967), where the Court held a public telephone booth to be within the protection of the Fourth Amendment:

> * * * searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. 389 U.S. at 357.

Or as the Court put it through Mr. Justice Harlan in *Mancusi* v. *DeForte*, 392 U.S. 364 (1968), where the Court gave standing to an indicted union official to object at his state trial to documents seized from the union office that he shared with others:

> * * * it is settled for purposes of the Amendment that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." 392 U.S. at 370.

Or yet again as Mr. Justice Fortas put it in Part II (in which Mr. Justice Douglas joined) of his opinion, concurring in part and dissenting in part, in *Alderman* v. *United States*, 37 U.S.L. Week 4189 (March 10, 1969):

> * * * The Fourth Amendment, unlike the Fifth, is couched in terms of a guarantee that the Government will not engage in unreasonable searches and seizures. It is a general prohibition, a fundamental part of the constitutional compact, the observance of which is essential to the welfare of all persons. 37 U.S.L. Week at 4197.

The reason for the requirement of a warrant is to interpose the detached scrutiny and the consequent deliberate, impartial judgment of a judicial officer between the individual and government agents. As the Court put it in *Katz* v. *United States*, 389 U.S. 347 (1967), referring to the governmental agents in that case:

> * * * They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself,

to observe precise limits established in advance by a specific court order. * * *

* * *

* * * And bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from Fourth Amendment violations "only in the discretion of the police." *Id.* at 97.

These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. * * * 389 U.S. at 356, 358-59.

Thus in the companion cases of *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), and *See* v. *City of Seattle,* 387 U.S. 541 (1967), where the Court noted probable cause "to re-examine whether administrative inspection programs, as presently authorized and conducted, violate Fourth Amendment rights" (387 U.S. at 525), the Court held that they did; and overruled *Frank* v. *Maryland,* 359 U.S. 360 (1959) "to the extent that it sanctioned such warrantless inspections" (387 U.S. at 528). In *Camara,* which involved a residence, the Court through Mr. Justice White reasoned:

* * * The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasion by governmental officials. * * *

* * *

* * * except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant. * * *

* * *

In summary, we hold that adm
of the kind at issue here are signifi
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* * * 387 U.S. at 528, 528-29, 534

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In *See*, which involved commercial
added:

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> We therefore conclude that
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Even in *Frank* v. *Maryland*, 359 U
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> * * * Moreover, the inspector h
> entry and did not attempt it.
> resistance, but officials are not au
> the unwilling occupant. 359 U.S.

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366-67.

In addition, a Fifth Circuit case
to the Second Circuit's decision in th
*States* v. *Frisch*, 140 F.2d 600 (5th C

be cited as *contra*
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1944).

It is also relevant to note that the reach of the Fourth Amendment extends not only to administrative inspections, but also to administrative subpoenas: once again judicial review is interposed between the individual and the administrative agency. As the Court stated through Mr. Justice White in *See* v. *City of Seattle*, 387 U.S. 541, 544-45:

> It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. The agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute, but it must delimit the confines of a search by designating the needed documents in a formal subpoena. In addition, while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply.
>
> It is these rather minimal limitations on administrative action which we think are constitutionally required in the case of investigative entry upon commercial establishments. The agency's particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved. But the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field. Given the analogous investigative functions performed by the administrative subpoena and the demand for entry, we find untenable the proposition that the subpoena, which has been termed a "constructive" search,

*Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 202, is the subject to Fourth Amendment limitations which do not apply to actual searches and inspections of commercial premises.

For a collection of many cases, state as well as federal, see Rogge, *Inquisition by Officials: A Study of Due Process Requirements in Administrative Investigations*—I, 47 Minn. L. Rev. 939 (1963); II, 48 Minn. L. Rev. 557 (1964); III, 48 Minn. L. Rev. 1081 (1964).

We submit that *Camara* and *See* are dispositive of the case at bar.

For the past 300 years and more, powerful voices among us have pointed out the importance of guaranteeing to the individual a certain area that is free from intrusion by the state. As early as 1603 in *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (1603), the court stated: "That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose * * *"

Coke in his *Institutes* wrote that a man's house was his castle. 3 INST. *162.

The elder Pitt, Lord Chatham, declared movingly in the reign of George III: "The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter!—all his force dares not cross the threshold of the ruined tenement!" 1 Brougham,

*Historical Sketches of Statesmen Who Flourished in the Time of George III* 42 (1858).

The practice of issuing search warrants arose in England in the middle of the 1600s. Before that time Coke in his *Institutes* stated that in the absence of an indictment justices of the peace had no power to issue a warrant "to search for a felon, or for stolen goods, for they being created by an act of parliament have no such authority granted unto them by any act of parliament." 4 *Inst.* *176-*77. But after the middle of the century Matthew Hale expressed a contrary opinion:

> In case of a complaint and oath of goods stolen, and that he suspects the goods are in such a house, and shews the cause of his suspicion, the justice of peace may grant a warrant, and to attach the goods and the party in whose custody they are found, and bring them before him or some justice of peace to give an account how he came by them, and farther to abide such order as to law shall appertain. * * *"

2 Hale, *The History of the Pleas of the Crown* 113 (published by Emlyn from the original manuscripts, Wilson ed. 1778)

Search warrants were used originally to recover stolen property. With the passage of the Licensing Act of 1662 for publications, the crown took to the use of these warrants in a general form to search for writings alleged to be seditious and for their authors, printers, and publishers. It was such a warrant which was used against John Wilkes and No. 45 of his paper the *North Britain*. This number came out in April 1763 and contained a biting

criticism of George III's message to Parliament. The king's ministers regarded it as a seditious libel and Lord Halifax, one of the secretaries of state, issued a general warrant. This warrant was ruled to be illegal, and the various resulting actions against the king's messengers were estimated to have cost the government as much as 100,000 pounds. 3 May, *Constitutional History of England* 6, 7 (7th ed. 1882). Wilkes recovered 4000 pounds from Lord Halifax himself.

Not long thereafter Lord Halifax furnished the court with another opportunity to consider general warrants. This time the offending publication was *The Monitor*, or *British Freeholder*. The warrant differed from that used against Wilkes in that it named the person, John Entinck, whose effects were to be seized, but it put no restrictions upon the officers as to the scope of the search. Entinck sued those who conducted the raid. The jury found a special verdict, stating the facts of the raid but setting up that such warrants had been in common use. Lord Camden, with the unanimous concurrence of the other judges of the court, ruled that general search warrants were illegal. To permit them, he reasoned, "would destroy all the comforts of society." *Entinck* v. *Carrington*, 2 Wils, K. B. 275, 291, 95 Eng. Rep. 807, 817, 818 (1765). According to the report of the case in 19 How. St. Tr. 1029, Lord Camden stated that to sanction the practice of issuing general search warrants "would be subversive of all the comforts of society." At 1066.

Just as in the mother country so in the colonies there was objection to general searches. However, in the colonies

the resistance was to searches for goods on which duties had not been paid rather than for publications. Parliament at the same session in 1662 in which it enacted a licensing act for publications, passed equally drastic measures for the enforcement of the revenue laws. The chief weapon of enforcement was the writ of assistance. This was a blanket permit issuable to anyone, authorizing him to search any suspected place. The only limitation was that the search had to be in the daytime. Proceedings under this statute appear to have aroused little opposition in England; but in the colonies, where taxation was none too popular irrespective of the methods of collection, the story was otherwise. In the course of time determined opposition arose. In 1761 in Massachusetts the legality of writs of assistance was questioned in *Paxton's Case.* The advocate general for the crown was James Otis and as such it became his duty to argue for their validity. Instead he resigned his office and took the other side of the case. In a masterful address he denounced writs of assistance as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in an English law book." 2 *The Works of John Adams* App. 523 (Chas. Francis Adams ed. 1850); Tudor, *Life of James Otis* 63 (1823). He further declared that they would place "the liberty of every man in the hands of every petty officer." 2 *The Works of John Adams* App. 524 (Chas. Francis Adams ed. 1850); Tudor, *Life of James Otis* 66 (1823). Mr. Justice Black quoted this poignant comment in his dissenting opinion in *In re Groban,* 352 U.S. 330, 338 (1957).

The judges in *Paxton's Case* almost convinced by Otis's argument sent to England for advice; but subsequently in obedience to order from the ministry, recognized the writs.

Although the case was lost, the cause was not. John Adams, who heard Otis's argument, later wrote:

> Every man of a crowded audience appeared to me to go away as I did, ready to take up arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child independence was born.

Letter to William Tudor, March 29, 1817, printed in 8 *Old South Leaflets* 57, 60 (no. 179, p. 4).

Justice Bradley subsequently stated in his opinion for the Court in *Boyd* v. *United States*, 116 U.S. 616, 626 (1886), that Lord Camden's "great judgment in that occasion [*Entinck* v. *Carrington*, 2 Wils, K. B. 275, 291, 95 Eng. Rep. 807, 817, 818, 19 How. St. Tr. 1029 (1765)] is considered as one of the landmarks of English liberty."

In *Boyd*, the Court held that a provision of an act of Congress which required, in the words of the Court, "a compulsory production of a man's private papers in a proceeding to forfeit his property for alleged fraud against the revenue laws" violated the Fourth Amendment's prohibition of unreasonable searches and seizures. Justice Bradley explained:

> * * * And any compulsory discovery by extorting the party's oath or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom. 116 U.S. at 631-32.

In the same vein Justice Brandeis wrote in his dissenting opinion in *Olmstead* v. *United States*, 277 U.S. 438 (1928):

> • • • The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. • • • 277 U.S. at 478.

The *Olmstead* case was questioned in *Berger* v. *New York*, 388 U.S. 41 (1967) and overruled in *Katz* v. *United States*, 389 U.S. 347 (1967). Justice Douglas in his concurring opinion in *Berger* stated that *Berger* overruled *Olmstead sub silentio*. 388 U.S. at 64.

In the same vein the Court wrote in *Wolf* v. *Colorado*, 388 U.S. 25, 27 (1949):

> The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.

The actual holding in *Wolf*, that material illegally seized by state officers was admissible in a state court proceeding, was overruled in *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

Today the reach of the Fourth Amendment, of the right to be let alone by the government (to paraphrase the language of Justice Brandeis in his dissenting opinion in *Olmstead*), extends far beyond one's home. It extends to a sealed letter entrusted to the mail. ***Ex parte Jackson,*** 96 U.S. 727 (1877). It extends to an individual in a business office. ***Silverthorne Lumber Co.*** v. ***United States,*** 251 U.S. 385 (1920). It extends to one in a friend's apartment. *Jones* v. ***United States,*** 362 U.S. 257 (1960). It extends to one in a taxicab. ***Rios*** v. ***United States,*** 364 U.S. 253 (1960). It extends to a guest in a hotel room. ***Stoner*** v. ***California,*** 376 U.S. 483 (1964). It extends to a person in a public telephone booth. ***Katz*** v. ***United States,*** 389 U.S. 347 (1967). It extends to police detention for the purpose of taking fingerprints. ***Davis*** v. ***Mississippi,*** 37 U.S.L. Week 4359 (April 22, 1969). It extends to an open field adjacent to one's house which one seeks to preserve as private. *Wattenberg* v. ***United States,*** 388 F.2d 853 (9th Cir. 1968). And it extends to commercial premises which are not open to the public. *See* v. ***City of Seattle,*** 387 U.S. 541 (1967).

The approach of the Fourth Amendment, that of guaranteeing to the individual a certain area that is free from intrusion by the government, expresses itself in many other ways than a proscription of unreasonable searches and seizures. It expresses itself, for instance, in giving a right to an individual to have pornography in his own home. *Stanley* v. *Georgia,* 37 U.S.L. Week 4315 (April 7, 1969). It expresses itself, for instance, in protecting a husband and wife in the practice of contraception. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965).

The approach behind the Fourth Amendment, that of guaranteeing to the individual a certain area that is free

from intrusion by the government, has helped to bring about the protection of confidential relationships such as those between attorney and client, and husband and wife. The protection of the confidential communications between attorney and client goes back to the reign of Elizabeth I. *Berd* v. *Lovelace,* Care 62, 21 Eng. Rep. 33 (1576-1577); *Kelway* v. *Kelway,* Cary 89, 21 Eng. Rep. 47 (1579-1580); *Dennis* v. *Codringham,* Cary 100, 21 Eng. Rep. 53 (1579-1580). Similar protection to the confidential communications between husband and wife may be traced back to a case as early as 1684. *Lady Ivy's Trial,* 10 How. St. Tr. 555, 628 (1684).

However, the government contended, and the Second Circuit agreed (App. I, pp. 12a-17a), that the inspection provisions of 26 U.S.C. §§5146(b) and 7606(a) resulted in a waiver of petitioner's Fourth Amendment rights. We submit on the contrary that these sections do not have any such result. It may also be observed that, as in *Frank* v. *Maryland,* 359 U.S. 360 (1959), 26 U.S.C. §7342 provides for a fine of $500 for a refusal to permit an examination under 26 U.S.C. §7606.

Furthermore, if sections 5146(b) and 7606(a) were to have any such result as the waiver of petitioner's Fourth Amendment rights, these sections would themselves be unconstitutional as violating that amendment.

Whether there may be a waiver of a federal constitutional right, to operate not contemporaneously but *in futuro,* is at least an open question. The Court adumbrated the question in *Gardner* v. *Broderick,* 392 U.S. 273, 278-79

(1968) and *Uniformed Sanitation Men* v. *Comm'r of Sanitation*, 392 U.S. 280, 284 n. 5 (1968), but did not reach it. See also *Spevack* v. *Klein*, 385 U.S. 511 (1967), and *Garrity* v. *New Jersey*, 385 U.S. 493 (1967).

The Supreme Court of Michigan did decide the question. It held in *People ex rel. Attorney General* v. *Lansing Municipal Judge*, 327 Mich. 410, 42 N.W. 2d 120 (1950), that a statutory provision permitting conservation officers to make certain wild life inspections without a warrant, was unconstitutional as permitting unreasonable searches and seizures. The Court reasoned:

> Under Michigan law a man may not marry a wife, operate a motor vehicle on the highways, practice law, or a number of other things, without a license from the State. May the legislature condition the granting of such licenses upon the applicant's waiver of his constitutional rights against unreasonable search of his home, marital chamber, automobile, law office or other place where a licensed activity occurs? • • •

327 Mich. at 431, 42 N.W. 2d at 125. *Cf. United States* v. *Stanack Sales Co.*, 387 F.2d 849 (3d Cir. 1968), where the Third Circuit applied *See* v. *City of Seattle*, 387 U.S. 541 (1967), to inspectors of the Food and Drug Administration; and refused to find a waiver of Fourth Amendment rights.

The government, and the Second Circuit (App. I, p. 13), relied on *Zap* v. *United States*, 328 U.S. 624 (1946). Whatever that case may say, there was involved no forcible entry. As the Court itself stated:

> • • • No force or threat of force was employed. Indeed, the inspection was made with the full cooperation of petitioner's staff. • • •

> * * * They [the governmental agents] did not obtain access by force, fraud, or trickery. * * * 328 U.S. at 628, 629.

The government, and the Second Circuit (App. I, p. 13), also relied on *Shapiro* v. *United States,* 335 U.S. 1 (1948). *Shapiro* is a Fifth Amendment case where the Court created a required records exception to the privilege against self-incrimination. To the extent that the language in that case, a five-to-four decision of more than two decades ago, may be thought to support a waiver *in futuro* of constitutional rights, the case is due for re-examination. Mr. Justice Fortas in his concurring opinion in *Spevack* v. *Klein,* 385 U.S. 511 (1967), stated that he "would be prepared in an appropriate case to re-examine the scope of the principle announced in *Shapiro* v. *United States,* 335 U.S. 1 (1948)". 385 U.S. at 520.

## II. The United States Court of Appeals for the Second Circuit did not have jurisdiction to hear the appeal in this case under 18 U.S.C. §3731 as amended by section 1301(a) of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 237.

Both parties, and the court, assumed that an appeal lay in the instant case under 18 U.S.C. §3731, as amended by section 1301(a) of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 237. They were mistaken. To begin with, 18 U.S.C. §3731 deals with appeals by the government directly to the United States Supreme Court in certain instances in criminal cases. This is not a criminal case. There is pending no criminal charge.

In the second place, the petitioner is not charged with a violation of any law of the United States.

In the third place, the United States Attorney did not certify to District Judge Weinstein, who granted the petitioner's motion for the return of its bottled liquor, that the appeal was not taken for the purpose of delay, and that the evidence was a substantial proof of the charge pending against the petitioner. There was of course no charge.

## Conclusion

Just as writs of assistance in colonial days, so warrantless inspections by agents of the Internal Revenue Service today, would (in the living words of James Otis in his argument against the legality of writs of assistance) place "the liberty of every man in the hands of every petty officer". The Court should grant certiorari, and hold *See* v. *City of Seattle*, 387 U.S. 541 (1967), applicable to warrantless forcible entries and the resultant illegal searches and seizures by federal officials.

Respectfully submitted,

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# APPENDICES TO PETITION

## APPENDIX I

**Opinion of District Judge Walter R. Mansfield for the Second Circuit**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 310—September Term, 1968.

(Argued February 12, 1969 Decided March 26, 1969.)

Docket No. 32817

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In the Matter of the Petition of

THE COLONNADE CATERING CORP.,

*Plaintiff-Appellee,*

—v.—

UNITED STATES OF AMERICA,

*Defendant-Appellant.*

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Before:

ANDERSON and FEINBERG, *Circuit Judges,*
and MANSFIELD, *District Judge.**

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Appeal from an order of the United States District Court for the Eastern District of New York, Weinstein, J., granting appellee, The Colonnade Catering Corp.'s petition for the suppression and return of certain of its property seized by agents of the Internal Revenue Service. Reversed and remanded.

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* Of the Southern District of New York, sitting by designation.

JEROME M. STEMBER, New York, N. Y., *for Appellee.*

CHARLES RUFF, Attorney, Department of Justice, Washington, D. C. (Joseph P. Hoey, United States Attorney, David P. Steinmann, Assistant United States Attorney, Eastern District of New York, and Richard L. Mays, Attorney, Department of Justice, Washington, D. C., on the brief), *for Appellant.*

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MANSFIELD, *District Judge:*

This appeal is taken by the Government pursuant to 18 U.S.C. §3731 from an order of the district court granting the petition of appellee Colonnade Catering Corporation ("Colonnade") for the suppression and return of 53 bottles containing alcoholic spirits and two funnels seized by agents of the Internal Revenue Service. We conclude that the search and seizure of the property was reasonable and accordingly reverse the decision below.

On the afternoon of Saturday, May 18, 1968, three Special Investigators of the Internal Revenue Service, accompanied by a Nassau County policeman, entered Colonnade's premises at approximately 4:00 P.M. Collonade, which holds a New York State liquor license, operates a catering establishment, and at the time there was a party in progress in its ballroom where liquor was being served. The purpose of their visit was to determine whether Colonnade possessed any liquor bottles that had been refilled or altered, which would constitute a violation of both fed-

eral tax laws, 26 U. S. C. §5301(c) and New York's Alcohol Beverage Control Law §107-a and Rule 4 of the State Liquor Authority.[1] One of the agents had attended a party there on the previous Saturday and had observed what he thought were resealed bottles of liquor.

After looking around the ballroom with the manager's consent, the agents inspected the basement of the building without result and stated that they wished to enter a locked liquor storeroom located about 75 feet from the entrance to the ballroom. They were informed that Colonnade's president was the only person with authority to unlock the door; he was called to the scene but refused to do so. Instead he asked the agents if they possessed a warrant and, upon being told by the area supervisor of the Alcohol Tax Unit (who had meanwhile arrived) that according to statute they did not need one, he refused to unlock the door, whereupon the agents broke the lock,

1. The federal statute provides in pertinent part that:

"*Refilling of liquor bottles.*—No person who sells, or offers for sale, distilled spirits, or agent or employee of such person shall—

"(1) place in any liquor bottle any distilled spirits whatsoever other than those contained in such bottle at the time of stamping under the provisions of this chapter; or

"(2) possess any liquor bottle in which any distilled spirits have been placed in violation of the provisions of paragraph (1); or

"(3) by the addition of any substance whatsoever to any liquor bottle, in any manner alter or increase any portion of the original contents contained in such bottle at the time of stamping under the provisions of this chapter; or

"(4) possess any liquor bottle, any portion of the contents of which has been altered or increased in violation of paragraph (3); * * *."

entered, and seized the liquor and funnels which are the subject of this petition.

Upon Colonnade's motion to suppress the evidence pursuant to Rule 41(e), F. R. Cr. P.,[2] the district court held that the warrantless search and seizure was in derogation of the right of Colonnade and its officers "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure." U. S. Const. Amend. 4. In his opinion Judge Weinstein concluded that the Supreme Court's recent decisions in *Camara* v. *Municipal Court*, 387 U. S. 530 (1967) and *See* v. *City of Seattle*, 387 U. S. 541 (1967), extending Fourth Amendment protection to administrative searches of the type there under attack, including a search of a commercial warehouse, precluded a warrantless search of Colonnade's liquor storeroom. The Government contends that the warrantless search in this case is to be distinguished from those before the Supreme Court there, and that search without a warrant was permissible here because it was authorized by statute, 26 U. S. C. §§5146(b) and 7606(a),[3] and the essential gov-

2. Rule 41(e), F. R. Cr. P., provides in pertinent part that:

"A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant. * * * If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial."

3. These sections provide:

26 U. S. C. §5146(b)

"*Entry of premises for inspection.*—The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting

ernmental purpose to be served would be frustrated if a warrant were required. See *Peeples* v. *United States*, 341 F. 2d 60 (5th Cir.), cert. denied, 380 U. S. 988 (1965); *United States* v. *Sessions*, 283 F. Supp. 746 (N. D. Ga. 1968) (following *Peeples* after the decisions in *Camara* and *See*); accord: *United States* v. *Duffy*, 282 F. Supp. 777 (S. D. N. Y. 1968) (dictum). Appellant further argues that in any event Colonnade, by engaging in the retail liquor business, impliedly consented to warrantless inspections of its business premises.

The first qnestion to be decided is whether the search here must be barred on the authority of *Camara* and *See*, which dealt with the legality of warrantless administrative searches conducted in aid of municipal code enforcement. In those decisions the Supreme Court concluded that where broad inspection authority is granted by statute to an administrative officer, the warrant procedure with its individualized review is required to assure that reasonable limits will be imposed upon the exercise of such authority in each instance and to protect the occupant against excessive intrusion upon his privacy, since he cannot be expected to know the lawful limits of the inspector's power. Furthermore, since the need to search in some cases might

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or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept by such dealer on such premises."

26 U. S. C. §7606(a)

"*Entry during day.*—The Secretary or his delegate may enter, in the daytime, any building or place where any articles or object subject to tax are made, produced, or kept, so far as it may be necessary for the purposes of examining said articles or objects."

be questionable, a particular search might be unreasonable. However, the Supreme Court limited its decision to "administrative searches of the kind at issue here," *Camara, supra* at 534 (i.e., those conducted pursuant to broad grants of authority). Justice White, speaking for the majority in both cases, further observed that warrantless searches are permitted in "certain carefully defined classes of cases," and stated that the question of whether to require a warrant must depend "in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," *Camara, supra* at 533. With respect to a search of business premises, such as that involved here, the Court went further:

> "We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product." *See, supra* at 545-546.

Thus the door was left open to warrantless administrative searches in those special situations where protection against excessive intrusions upon the individual's privacy could be reasonably assured and the objectives demanded by the public interest would be frustrated if the inspectors were required to obtain warrants. We believe that for several reasons the limited search of a liquor licensee's storeroom by Internal Revenue Service agents falls within the limited exception contemplated by the Supreme Court. In the first place, the statutory grants authorizing the administrative searches in *Camara* and *See*, unlike those

here, were extremely broad in scope. For instance, §503 of the San Francisco City Housing Code, which was the ordinance under consideration in *Camara,* gave city inspectors the power to enter "any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code." This included the duty (among others) of determining through periodic inspection whether conditions existed in "residential buildings, dwelling units and neighborhoods" that might be found to be "dangerous, substandard, insanitary or obsolete and deficient," San Francisco Housing Code §101; Part III, §86, San Francisco Municipal Code. In *See,* which involved an attempted inspection of a locked commercial warehouse, the authority was only slightly more restricted. The relevant statute provided for entry by the Fire Chief into buildings other than dwellings "as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards," Seattle Fire Code §8.01.050, 387 U. S. at 541. These expansive grants of authority would permit an inspector, unless a warrant was required, to roam at will through any portion of a dwelling house, in one case, or of commercial property, in the other, without the occupant or owner being able to determine the need for the inspection, its purpose and its lawful limits. Theoretically the inspection might seek to uncover any one or more of innumerable possible violations, such as faulty wiring, plumbing, foundations, beams, or the like. Without the safeguard of the warrant machinery, the inspectors could conduct a "general search" of the very type pre-

scribed by the Fourth Amendment. As Justice White noted, "such broad statutory safeguards are no substitute for individualized review," 387 U. S. at 533.

In contrast to such broad delegation of inspection authority, the statutory grants of inspection power here under review are carefully defined and narrowed to the point where they grant little, if any, more authority than that which would be extended in a warrant issued by a magistrate after review. The sole authority granted is permission, during business hours, to enter the premises of a dealer in liquor who is subject to a special federal alcohol tax, 26 U. S. C. §5121(a),[4] for the limited purpose (not involved here) of inspecting those "records or other documents required to be kept by the dealer under this chapter" and the further limited purpose of inspecting "any distilled spirits, wines or beers kept by such dealer on such premises," 26 U. S. C. §5146(b), or to enter "any building or place where any articles or object subject to tax are made, produced, or kept, so far as it may be necessary for the purposes of examining said articles or objects," 26 U. S. C. §7606(a). The agent in the field is not, by virtue of these statutory provisions, given authority to conduct a general search of the premises; he is limited to the place where the liquor is kept and to inspection of specific objects, i.e., the alcoholic beverages. The scope of permissible intrusion without a warrant is thus carefully restricted and it does not entitle the agent to dispense with a warrant before searching the dwelling place of the owner

4. This section provides that:

"*Retail dealers in liquor.*—Every retail dealer in liquor shall pay a special tax of $54 a year. * * *"

of a retail liquor establishment, *United States* v. *Frisch*, 140 F. 2d 660 (5th Cir. 1944), or clothing belonging to such a person, cf. *Finn's Liquor Shop Inc.* v. *State Liquor Authority*, —— App. Div. 2d ——, 294 N. Y. S. 2d 592 (1st Dept. 1968).

The limited search permitted to be made by an alcohol tax inspector is also distinguishable in another significant respect from the searches reviewed in *Camara* and *See*. As was pointed out by Justice White, broad statutory authorizations of the type there under consideration pose the danger that in a confrontation with an administrative inspector claiming statutory authority to enter and inspect for possible housing or fire code violations, the homeowner or businessman may have "no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization." 387 U. S. at 532. Such a risk, in the type of inspection involved here, is minimal. Dealers in liquor, unlike homeowners or businessmen conducting less specialized activities, are engaged in a heavily regulated business.[5] They are usually well aware of the regula-

5. All states which permit the retail sale of liquor by private persons license this activity. A 1960 survey showed that, including the District of Columbia, 33 states had such licensing programs for sales at retail for consumption off the premises, while 17 operated under the state monopoly system. H. Levin, *Economic and Regulatory Aspects of Liquor Licensing*, 112 U. Pa. L. Rev. 785, Table 1 at 786 (1964) [Derived from Joint Committee of the States to Study Alcoholic Beverage Laws, *Alcoholic Beverage Control* (rev. ed. 1960)]. No state permits the sale of alcoholic beverages for consumption on the premises without a license. The mass of state and federal legislation regulating this industry is collected and annotated in *CCH Liquor Control Law Rep.* (9 vols.).

The regulatory laws of many states, including those of New York, to which Colonnade is subject, provide for warrantless inspections

tions to which they are subject, and are undoubtedly familiar with the nature and limits of the inspector's authority. Cf. *Zap* v. *United States*, 328 U. S. 624 (1946). In fact it is their very knowledge of the possibility of such inspections that make the inspection program an effective means of enforcing the tax law. Such sophisticated licensees, when faced with an inspector whose authority to search is carefullly restricted and circumscribed by regulations known to all, are undoubtedly acquainted with the limits upon the agent's inspection rights.

For the foregoing reasons the imposition of a requirement that alcohol tax inspectors obtain warrants before carrying out the specifically defined inspection authorized by statute would serve no useful purpose in protecting the Fourth Amendment rights of the liquor dealer. Those rights are already protected by the restrictions contained in the statute itself. We are not dealing here with "area" or "general" searches of the type authorized by municipal codes, and there is no need to utilize the warrant machinery as a means of establishing standards for protection against unwarranted intrusions possible under such codes. Here the area eligible for inspection is clearly and narrowly defined; the purpose is relevant; the scope is limited; and all of these aspects are well known to the operator of the

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of the type authorized by the federal statutes here. E.g., 3 McKinney's Consol. Laws of New York Ann. §106(15); 35 Alaska Compiled Laws Ann. §35-4-15(6); Ark. Statutes, Ch. 48, §48-203(d); 30 Conn. Gen. Statutes Ann. §30-6; Fla. Statutes, Ch. 562, §562.031; 43 Ill. Ann. Statutes §112.2; Kansas Statutes Ann. Ch. 41, §41-209 (5); 26 La. Rev. Statutes §378; 2B Ann. Code of Md. §190; Ann. Laws of Mass. Ch. 138, §24; Rev. Statutes of Neb. Ch. 53, §53-117; 33 N. J. Statutes Ann. §33:1-23; 37 Okl. Statutes §514(9); 47 Penn. Statutes Ann. §2-209; 7 Vt. Statutes Ann. §564.

premises being inspected. Nothing of consequence therefore would be achieved through individualized review by a magistrate. In the proper exercise of his discretion, the magistrate would be compelled to issue a warrant as a matter of course, duplicating the limited authority already granted by statute. In short, the statute here under consideration is the equivalent of a warrant.

There remains the question of whether the public interest in alcohol tax inspections would be hindered or prejudiced in any way by warrant procedure, even if all that it involved were the automatic issuance of "rubber stamp" warrants. The public interest in such periodic inspections is hardly open to question. It derives from the potentially great loss to the national revenue which would result from ineffective enforcement of the alcohol tax law. In the fiscal year 1966, for instance, over $3 billion was collected in excise taxes on distilled spirits. The Annual Report of the Commissioner of Internal Revenue (1967), p. 117. A common method of evading such taxes by retailers who sell liquor by the drink is the illegal refilling of bottles in violation of 26 U. S. C. §5301(c). The goal of the inspection is to deter such violations. An important factor in achieving that goal is the element of surprise. As experience and efforts to enforce the Eighteenth Amendment so frequently revealed in the 1920's, the liquor dealer-violator who receives an advance tipoff of an imminent inspection destroys the evidence before the agent arrives on the scene. Although the dealer knows that he may be visited by inspectors, the effective implementation of the law depends upon his being kept in the dark as to the precise time of the

visit. If, as the Supreme Court indicated in *Camara*, "warrants should normally be sought only after entry is refused," 387 U. S. at 539, the cat would be let out of the bag in most instances where a violation was being committed and the essential governmental purpose would be frustrated. Warned of the inspection the dealer would quickly destroy or otherwise dispose of the contents of the illegally filled bottles before the inspector returned with his warrant. In this respect the result would differ radically from that presented in municipal code enforcement of the type at issue in *Camara* and *See*, where a delay attendant upon obtaining a warrant might be helpful in achievement of the public interest goals, since the violator might be induced to eliminate the hazard before the inspector's return. Here the effect will be to enable the dealer to escape payment of taxes constituting an essential part of the revenue; and it may be expected that if such a dealer could escape detection, he would repeat the violations with impunity.

We further conclude that an inspection of the type here under review may be lawfully conducted without a warrant for the reason that the retail liquor dealer, upon obtaining his state license and his federal occupational stamp, enters this highly regulated business with a full awareness and expectation that his liquor supply, including that located in "places of storage," 26 U. S. C. §5146(b), will be inspected by representatives of the Treasury Department. Whether his conduct in entering the business upon such a condition be labelled an implied consent to such an inspection, cf. *Zap* v. *United States*, 328 U. S. 624 (1946), or a limited dedication to public inspection of that portion of his premises in which his liquor supply is stored,

it is clear that he anticipates that such an inspection will be made and he is well aware of the need for such inspection. The situation is substantially the same as if the dealer had knowingly entered into a contract waiving his right to privacy in those areas where he keeps and sells alcoholic beverages. Such a waiver with respect to subject matter in which the public has a special interest would be enforceable, *Zap* v. *United States,* 328 U. S. 624 (1946); see *Shapiro* v. *United States,* 335 U. S. 1 (1948), and is to be distinguished from unrelated waivers, cf. *Garrity* v. *New Jersey,* 385 U. S. 493 (1966); *Spevack* v. *Klein,* 385 U. S. 511 (1967), which have been nullified on the ground that such conditions would constitute an unreasonable forfeiture of the citizen's constitutional rights. It does not strike us as unreasonable to require that a liquor dealer, as a condition to entry into a business in which the Government has such a direct and special interest, submits himself to statutory authority to the extent of permitting warrantless inspection of alcoholic beverages on his business premises. In the face of such extensive regulatory measures, the dealer can hardly contend with any degree of conviction that he has a "reasonable expectation of freedom from governmental intrusion" into his bar and liquor storage space, *Mancusi* v. *DeForte,* 392 U. S. 364 (1968); *Katz* v. *United States,* 389 U. S. 347 (1967). In this respect his status differs sharply from that of the homeowner in *Camara* or the operator of a commercial warehouse in *See,* neither of whom could have been expected to have familiarity with the city inspectors' inspection powers under the broad municipal codes there involved. In contrast, the

liquor dealer is well aware of the limits of the alcohol tax inspector's authority. To require him to execute an express advance agreement authorizing periodic inspections without warrant would be a superfluous gesture in view of their general awareness of the likelihood of periodic surprise inspections. His situation is comparable to that of the traveler who anticipates a border search of his baggage upon entry into the United States, 19 U. S. C. §§1467, 1496, 1582, a coal mine operator who expects to be inspected by the Secretary of Interior, 30 U. S. C. §§451-454, or an air carrier which is aware of the prospect that its lands, buildings and equipment will be inspected by the C. A. B., 49 U. S. C. §1377. The constitutionality of statutes authorizing such limited warrantless searches in the public interest is generally recognized, *Landau* v. *United States Attorney for the Southern District of New York*, 82 F. 2d 285 (2d Cir. 1936), and the additional imposition of warrant procedure would not serve any useful purpose.[6]

6. Many other federal statutory provisions permit warrantless inspections. E.g., 42 U. S. C. §2051 (inspection of places where research in atomic energy is performed by A. E. C.); 46 U. S. C. §408 (inspection of vessel boiler plates at manufacturer's plant by Coast Guard); 21 U. S. C. §§603, *et seq.* (inspection of meat and meat products by Secretary of Agriculture); 42 U. S. C. §262 (inspection of establishments engaged in the preparation of certain kinds of drugs by the Public Health Service); 15 U. S. C. §1270 (inspection of any factory or warehouse in which "hazardous substances" are manufactured, processed, packed, or held for introduction into commerce and of any vehicle being used to transport or hold such substances by the Secretary of Health, Education and Welfare); 21 U. S. C. §157 (inspection of any establishment engaged in the production of certain types of drugs for the treatment of animals by the Secretary of Agriculture); 21 U. S. C. §374 (inspection of any establishment where food, drugs, devices or cosmetics are manufactured, processed, packed or held for introduction into commerce by the Secretary of Health, Education and Welfare).

Having concluded for the foregoing reasons that the search of Colonnade's liquor storeroom conducted by the representatives of the Internal Revenue Service pursuant to 26 U.S.C. §§5146(b) and 7606(a) was not rendered unreasonable by the fact that it was conducted without a warrant, we turn to Colonnade's contention that the decision below should be affirmed on the ground that the search was unreasonable.

Colonnade contends that two factors in this case compel affirmance. First, it is argued that the fact of the agents' forcible entry into the liquor storeroom rendered the search "per se" unlawful. However, a search reasonably conducted pursuant to a search warrant is not rendered unreasonable by the use of force in its execution, if the prerequisite of announcement of authority and purpose is fulfilled, 18 U. S. C. §3109; the same standard applies to arrests without a warrant, *Sabbath* v. *United States,* 391 U. S. 585 (1968), and we see no rational basis for applying a different standard of conduct to warrantless searches. In short, where it is reasonable to conduct a search without a warrant, it is accordingly reasonable to use whatever minimal force is necessary to carry out the search, provided, as is the case here, that the authority of the agent to make the search and the purpose of the entry is announced, and consent to entry is not forthcoming. There would be no point in holding warrantless searches by alcohol tax inspectors to be reasonable if the owner of the premises could render them unreasonable by withholding his consent and compelling the agent to use the minimum amount of force necessary to accomplish his objective.

Second, it is strenuously urged by Colonnade that the search here was unreasonable because the Internal Revenue Service had some basis for believing that evidence of a violation of 26 U. S. C. §5301(c) could be found on the premises. Thus, it argues, although a routine "administrative" search might be reasonable, the existence of some ground for the search renders it a search pursuant to a "criminal investigation" for which a warrant should be required.[7] In point of fact, of course, any inspection or search conducted by an agent for possible alcohol tax violations could be characterized as a search pursuant to a criminal investigation. Whether or not he has cause to believe that evidence of any such violations will be found, the purpose of the inspection will be to determine, by testing the contents of liquor bottles, whether the business is being conducted lawfully or unlawfully.

Acceptance of defendant's contentions would place the agent in the position of being authorized to conduct a warrantless search only when he had no reason to suspect a possible violation. If, as *Camara* suggests, the withholding of consent forms a basis for a reasonable belief that evidence of a violation can be found, see p. 1677 *supra*, a warrant would be required whenever consent was not given, and the public interest in reasonable warrantless searches would be frustrated. We conclude, therefore, that warrantless searches pursuant to the limited statutory authority of 26 U. S. C. §§5146(b) and 7606(a) for the purpose of investigating possible violations of 26 U. S. C. §5301(c) are

7. Violation of 26 U. S. C. §5301(c) is punishable by a fine of not more than $1,000, or imprisonment for not more than one year, or both. 26 U. S. C. §5606.

reasonable within the meaning of the Fourth Amendment, whether or not there is a reasonable basis for believing that evidence of such violations may be found on the premises searched.

Accordingly, the decision of the lower court is reversed and the case remanded to the district court for the purpose of entering an order denying the petition of Colonnade for the suppression and return of property.

## APPENDIX II

### Memorandum and Order of June 28, 1968 of District Judge Jack B. Weinstein

[Caption Omitted]

APPEARANCES:

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WEINSTEIN, D. J.

Petitioner instituted this proceeding pursuant to Rule 41 of the Federal Rules of Criminal Procedure seeking the return of certain property and suppressing its use as evidence in any subsequent trial, hearing or proceeding. Because "the property was illegally seized without a warrant" (Rule 41(e)(1)) the motion must be granted.

The facts are undisputed. The petitioner, Colonnade Catering Corp., conducts a catering business and has a New York State liquor license. While a party was in progress, three Internal Revenue Service special investigators accompanied by a Nassau County policeman arrived at petitioner's premises at approximately 4:00 P.M. on May 18, 1968. (One of the Internal Revenue investigators, while a guest at petitioner's premises the previous week, had noted possible violations of the excise tax law.) They had no search warrant.

After looking around the ballroom (a search which led to no seizures and the legality of which is not in issue here), the investigators demanded that the petitioner's locked liquor storeroom—located approximately seventy-five feet from the entrance to the ballroom—be opened for their inspection. Petitioner's president, the only person authorized to unlock the storeroom, refused. The investigators, who had been joined by the Internal Revenue Service area supervisor, forcibly broke into the storeroom and removed fifty-three bottles of liquor. No arrest was made then or since.

The government has thus conceded that there was no search warrant, no arrest and no consent to the search. Nevertheless, the government maintains that the search—and seizure incident thereto—were lawful because the premises were public and subject to inspection. We do not agree.

Except "in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court*, 387 U. S. 523, 528-29, 87 S. Ct. 1727, 1731 (1967). This case falls within none of these classes of exceptions.

The government argues that because the petitioner's premises were open to the public, the petitioner is not entitled to the protection afforded by the Fourth Amendment against a warrantless search. Objects not exposed for public view are fully protected against a warrantless search. In *Katz* v. *United States*, 389 U. S. 347 (1967), the Supreme Court rejected having the resolution of search

and seizure problems turn on "whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected.'" "For," the Court declared, "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations omitted.] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U. S. at 351-52, 88 S. Ct. at 511 ("person in a telephone booth may rely upon the protection of the Fourth Amendment"). See also *Mancusi* v. *DeForte*, —— U. S. ——, ——, slip sheet p. 4 (1968) ("the Court's recent decision in *Katz* . . . makes it clear that capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion"). *United States* v. *Rabinowitz*, 389 U. S. 56 (1950), which approved a search of file cabinets, involved, unlike the case before us, a valid search warrant.

We need not decide whether a catering establishment which serves invited guests is properly characterized as "public." Under the *Katz* test, petitioner's locked storeroom, to which only the president had the key, must certainly be regarded as an area which petitioner sought "to preserve as private." It is entitled to constitutional protection. See also *United States* v. *Frisch*, 140 F. 2d 660 (5th Cir. 1944) (officers inspecting bar not entitled to break into upper floor where liquor stored); *cf. Wattenberg* v. *United States*, 389 F. 2d 853, 857-59 (9th Cir. 1968) (question of whether search of "open field" adjacent to defend-

ant's house protected by the Fourth Amendment; Court found that under *Katz* test, the search was illegal because it constituted "an intrusion upon what the resident seeks to preserve as private").

The government contends that its agents were engaged in a routine examination and inspection of the premises, and, consequently, were not required to obtain a search warrant before proceeding. There is no question but that numerous sections of the Internal Revenue Code authorize inspections. See, *e.g.*, 26 U.S.C. §§7606(a), 5146(b). These sections do not authorize warrantless inspections in the absence of consent. In *Camara* v. *Municipal Court*, 387 U. S. 530, 87 S. Ct. 1727 (1967), which arose from a warrantless search of a private resident by city housing investigators, the Supreme Court rejected the contention that the public interest requires that administrative searches be made without a warrant. While conceding that many desirable governmental policies require periodic inspection for their implementation, the Court nevertheless found that administrative searches "authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual." 387 U. S. at 534.

A companion case, *See* v. *City of Seattle*, 387 U. S. 541, 87 S. Ct. 1737 (1967), extended the reasoning of the *Camara* case to a warrantless inspection of a locked commercial warehouse. The Court saw "no justification for . . . relaxing Fourth Amendment safeguards" "merely because commercial rather than residential premises were the ob-

ject of the police instrusions." 387 U. S. at 543. As it noted,

> The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant. Ibid.

Any doubt that an individual is fully protected as to Fourth Amendment rights, even in a situation where the government has a right to inspect, was dispelled by the Supreme Court in its recent decision in *Mancusi* v. *DeForte*, —— U. S. ——, —— S. Ct. —— (1968). In a footnote, the Court pointed out (slip sheet p. 8, n. 11):

> The Court's opinion in Davis v. United States, 328 U. S. 582, does contain dicta to the effect that there is a lesser right to privacy when government officials have a "right" to inspect the seized items. See, e.g., id., at 593. However, the only holding in Davis was that there had been a valid consent to the search; the case "did not involve a search warrant issue." See v. City of Seattle, 387 U. S. 541, n. 7.

The government has not made any showing justifying its failure to obtain a search warrant. As the Supreme Court pointed out in the *Camara* case: "If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant" (387 U. S. at 539, 87 S. Ct. at 1736).

*Memorandum and Order of Jack B. Weinstein, D.J.*

The motion of the Colonnade Catering Corp. for the return of the property seized by the government is granted. Anything obtained as a result of the search is suppressed.

So ordered.

Dated: Brooklyn, New York, June 28, 1968.

_____

U.S.D.J.

# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 3 |
| Statutes involved | 3 |
| Statement | 4 |
| Argument | 6 |
| Conclusion | 10 |


CITATIONS


Cases:

*Camara* v. *Municipal Court*, 387 U.S. 523 ---- 5, 7, 8
*Davis* v. *United States*, 328 U.S. 582 ---- 9
*DiBella* v. *United States*, 369 U.S. 121 ---- 7
*Katz* v. *United States*, 389 U.S. 347 ---- 5, 9
*Mancusi* v. *Deforte*, 392 U.S. 364 ---- 9
*Peeples* v. *United States*, 341 F. 2d 60, certiorari denied, 380 U.S. 988 ---- 9
*Ray* v. *United States*, 374 F. 2d 638, certiorari denied, 389 U.S. 833 ---- 9
*See* v. *City of Seattle*, 387 U.S. 541 ---- 5, 7, 8, 9
*Selinger* v. *Bigler*, 377 F. 2d 542, certiorari denied, 389 U.S. 904 ---- 7
*Shapiro* v. *United States*, 335 U.S. 1 ---- 9
*United States* v. *Tiling*, No. 18938, C.A. 6, decided May 15, 1969 ---- 7
*United States* v. *Frisch*, 140 F. 2d 660 ---- 10
*Zap* v. *United States*, 328 U.S. 624, vacated, 330 U.S. 800 ---- 9

Statutes and rule:

Act of March 3, 1791, 1 Stat. 199, Sec. 26 ---- 8
Act of July 24, 1813, 3 Stat. 42, Sec. 5 ---- 8
18 U.S.C. (Supp. IV), 3731 ---- 5, 6, 7




353-818—69

Statutes and rules:—Continued


26 U.S.C. 5121 ..... 4
26 U.S.C. 5122 ..... 3
26 U.S.C. 5146 ..... 2, 3, 6, 8
26 U.S.C. 5301 ..... 4, 5
26 U.S.C. 7342 ..... 2
26 U.S.C. 7606 ..... 2, 3, 6, 8
28 U.S.C. 1291 ..... 5, 6, 7
Rule 41(e) 4. R. Crim. P ..... 5

# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1387

THE COLONNADE CATERING CORP., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. I) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on March 26, 1969. The petition for a writ of certiorari was filed on May 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTES INVOLVED

26 U.S.C. 5146(b) provides:

> Entry of premises for inspection.—The Secretary or his delegate may enter during busi-

ness hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept by such dealer on such premises.

26 U.S.C. 7606(a) provides:

Entry during day.—The Secretary or his delegate may enter, in the daytime, any building or place where any articles or object subject to tax are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects.

26 U.S.C. 7342 provides:

Any owner of any building or place, or person having the agency or superintendence of the same, who refuses to admit any officer or employee of the Treasury Department acting under the authority of section 7606 (relating to entry of [illegible]mises for examination of taxable articles) or refuses to permit him to examine such article or articles, shall, for every such refusal, forfeit $500.

26 U.S.C. 5[illegible]2(a) provides:

Retail dealer in liquors.—When used in this chapter, the term "retail dealer in liquors" means any dealer, other than a retail dealer in beer or a limited retail dealer, who sells, or offers for sale, any distilled spirits, wines, or beer, to any person other than a dealer.

26 U.S.C. 5301(c) provides in pertinent part:

> Refilling of liquor bottles.—No person who sells, or offers for sale, distilled spirits, or agent or employee of such person shall—
>
> (1) place in any liquor bottle any distilled spirits whatsoever other than those contained in such bottle at the time of stamping under the provisions of this chapter; or
>
> (2) possess any liquor bottle in which any distilled spirits have been placed in violation of the provisions of paragraph (1); or
>
> (3) by the addition of any substance whatsoever to any liquor bottle, in any manner alter or increase any portion of the original contents contained in such bottle at the time of stamping under the provisions of this chapter; or
>
> (4) possess any liquor bottle, any portion of the contents of which has been altered or increased in violation of paragraph (3);
>
> * * * * *

## QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction over the government's appeal.

2. Whether agents of the Internal Revenue Service, acting under the express authority of 26 U.S.C. 5146(b) and 7606(a), could, consonant with the Fourth Amendment standard of reasonableness, inspect without a warrant the business premises of a corporation holding a federal retail liquor dealer's occupational tax stamp and seize illegally refilled liquor bottles.

STATEMENT

The facts are undisputed and are set out in the opinion of the court of appeals (Pet. App. 2a–4a). Petitioner is incorporated under the laws of the State of New York, is licensed by the State to serve alcoholic beverages, and holds a federal retail liquor dealer's occupational tax stamp as required by 26 U.S.C. 5121(a).

On Saturday afternoon, May 18, 1968, at approximately 4:00 p.m., three Special Investigators of the Internal Revenue Service Alcohol and Tobacco Tax Division, accompanied by a Nassau County policeman, entered petitioner's place of business, a catering establishment, at which a party was in progress. Their purpose was to determine whether petitioner possessed any liquor bottles that had been refilled or altered, which would constitute a violation of both federal and State law. One of the agents had attended a party on these premises during the previous week and had observed what he believed were rescaled bottles of liquor.

With the consent of the banquet manager, the agents observed for a time the activity in the ballroom where liquor was being served. They then commenced an inspection of the basement of the building in the course of which they informed the banquet manager that they wished to enter a locked liquor storeroom approximately seventy-five feet from the ballroom entrance. The manager told the agents that petitioner's president, Mr. Rozzo, was the only person

with authority to unlock the door. Upon being summoned to the scene, Mr. Rozzo refused to do so and instead asked the agents whether they had a search warrant. He was told by the area supervisor of the Alcohol Tax Unit (who had been called to the premises by the other agents) that no search warrant was required to permit inspection of the storeroom. When Mr. Rozzo persisted in his refusal to unlock the door, the agents broke the lock, entered the storeroom and seized two funnels and fifty-three bottles of liquor which had been refilled in violation of 26 U.S.C. 5301(c).

Petitioner filed in the United States District Court for the Eastern District of New York a petition under Rule 41(e), F. R. Crim. P., for the return of the property seized and its suppression as evidence. The district judge, after a hearing, granted the petition, holding that under this Court's decisions in *Camara* v. *Municipal Court*, 387 U.S. 523, and *See* v. *City of Seattle*, 387 U.S. 541, the search of the storeroom (which the court characterized as an area sought to be preserved as private under *Katz* v. *United States*, 389 U.S. 347) was invalid under the Fourth Amendment because of the lack of a search warrant (Pet. App. II). The government appealed to the court of appeals, invoking in that court as statutory authority for the appeal the provisions of 18 U.S.C. 3731, as amended by Title VIII of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 237. The court of appeals reversed the judgment of the District Court, holding that *Camara* and *See* do not

preclude the narrow liquor searches authorized by Congress under 26 U.S.C. 5146(b) and 7606(a) (see *supra*, pp. 1–2), and that one who engages in the highly regulated business of a liquor dealer may reasonably be required to permit an inspection of his business premises during regular business hours by Internal Revenue agents without a warrant (Pet. App. I).

## ARGUMENT

1. Although no issue of appealability was raised below, petitioner apparently questions the jurisdiction of the court of appeals in this case (Pet. 22–23). Petitioner points out correctly that the provisions of 18 U.S.C. 3731, relied on to confer jurisdiction below, are inapplicable because, *inter alia*, no criminal charges were or are pending against petitioner in connection with the liquor seized in this case.[1] It is clear, however, that the court of appeals had jurisdiction over the government's appeal pursuant to 28 U.S.C. 1291, which provides: "The courts of appeals

[1] Insofar as here pertinent, 18 U.S.C. 3731 (Supp. IV) provides:

* * * * *

> An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:
>
> * * * * *
>
> From an order, granting a motion for return of seized property or a motion to suppress evidence, made before the trial of a person charged with a violation of any law of the United States, if the United States attorney certifies to the judge who granted such motion that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of the charge pending against the defendant.

shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court." The federal courts have consistently held that where, as here, no criminal charge is pending and no other preliminary action such as the filing of a complaint or an arrest has taken place, a judgment of a district court ordering the return of property as wrongly seized is an appealable "final decision" within the meaning of Section 1291. *E.g., Selinger* v. *Bigler,* 377 F. 2d 542 (C.A. 9), certiorari denied, 389 U.S. 904; see *DiBella* v. *United States,* 369 U.S. 121, 131–132. The fact that all parties and the court below believed the appeal was authorized under 18 U.S.C. 3731 rather than 28 U.S.C. 1291 is, of course, not dispositive and did not deprive the court below of jurisdiction. See *United States* v. *Filing* (No. 18938, C.A. 6, decided May 15, 1969, slip op., p. 3).

2. The court of appeals properly held, after exhaustive consideration, that the inspection and seizure by the Internal Revenue agents in this case was lawful. It correctly distinguished *Camara* and *See, supra,* which required search warrants for housing and fire-code inspections pursuant to broad grants of authority under local ordinances. Here, in contrast, Congress has narrowly defined the scope of the liquor business inspection by Internal Revenue agents which is permitted without a search warrant. The occupation involved is one which Congress has subjected to close control and inspection since the found-

ing of the Republic.[2] The sole authority granted, insofar as is relevant here, is permission to enter the premises of a liquor dealer during business hours and inspect any distilled spirits kept on such premises. See 26 U.S.C. 5146(b), 7606(a). An inspection of such limited scope and purpose, which the agents in this case did not exceed, is hardly comparable, as petitioner suggested, to a general or exploratory "search".

There are additional critical differences between this case and *Camara* and *See*. Unlike the situation there, a warrant is hardly necessary in order to advise liquor dealers of the lawfulness and limits of the inspection authority. Congress was dealing with persons in a heavily regulated and controlled industry, who may fairly be presumed to be familiar with the agents' right to inspect (see Pet. App. 9a–10a). Furthermore, the court below suggested that the requirement of a warrant might allow some illicit dealers in alcohol to frustrate the deterrent aim of the inspection statutes by affording them an opportunity to destroy evidence of their violations (Pet. App. 12a). For all these reasons, the court below properly held that the statutory scheme here is significantly different from those involved in *Camara* and *See* and that the decisions in those cases do not require invalidation of the reasonable regulatory provisions at issue here.

In addition, as the court below alternatively held (Pet. App. 12a–14a), the federal statutes authorizing

[2] See Act of March 3, 1791, Sec. 26, 1 Stat. 199, 205–206, granting to supervisors of revenue the right to inspect distilleries. See, also, Act of July 24, 1813, Sec. 5, 3 Stat. 42, 43–44, which appears to be a precursor of the present statutory scheme.

the inspection and seizure in this case may be sustained on the principle, which this Court and others have recognized,[3] that one who enters a highly regulated business, such as that of a dealer in liquor, in effect "submits himself to statutory authority to the extent of permitting warrantless inspection of alcoholic beverages on his business premises" (Pet. App. 13a). He cannot validly contend that he has a reasonable expectation of freedom from governmental intrusion in his liquor storage space. Compare *Katz* v. *United States,* 389 U.S. 347; *Mancusi* v. *DeForte,* 392 U.S. 364. And if the reasonableness of such a regulatory technique must be resolved "on a case-by-case basis" (*See* v. *City of Seattle, supra,* 387 U.S. at 545–546), this case is a clear one, involving a precise and limited inspection authority, similar to that granted in a warrant (see Pet. App. 11a), over a business which has been closely regulated since this nation was formed.

The fact that the agents in this case used force to break the lock on petitioner's storeroom did not invalidate the search. The force used was the minimum necessary to enable the agents to achieve entry and was employed only after the final refusal of petitioner's president, who was informed of the agents' lawful authority to inspect the liquor, to unlock the door. As the court below held (Pet. App. 15a):

[3] See *Zap* v. *United States*, 328 U.S. 624, vacated on other grounds, 330 U.S. 800; *Davis* v. *United States*, 328 U.S. 582; *Shapiro* v. *United States*, 335 U.S. 1; *Peeples* v. *United States*, 341 F. 2d 60 (C.A. 5), certiorari denied, 380 U.S. 988; *Ray* v. *United States*, 374 F. 2d 638 (C.A. 5), certiorari denied, 389 U.S. 833.

> There would be no point in holding warrantless searches by alcohol tax inspectors to be reasonable if the owner of the premises could render them unreasonable by withholding his consent and compelling the agent to use the minimum amount of force necessary to accomplish his objective.[4]

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1969.

[4] *United States* v. *Frisch*, 140 F. 2d 660 (C.A. 5), relied upon by petitioner as being in conflict with the instant decision (Pet. 11), is readily distinguishable since the incriminating material in that case was found as the result of a search of living quarters separate from the business premises of the defendant in the downstairs portion of the building.

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IN THE

# Supreme Court of the United States

October Term, 1969

No. 108

THE COLONNADE CATERING CORP.,

*Petitioner,*

*against*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

In a recent case, *Finn's Liquor Shop, Inc.* v. *State Liquor Authority,* 24 N.Y. 2d 647 (1969), the New York Court of Appeals applied *See* v. *City of Seattle,* 387 U.S. 541 (1967), *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), as well as *Mapp* v. *Ohio,* 367 U.S. 643 (1961), to a warrantless search and seizure by inspectors of the New York State Liquor Authority, despite the fact that New York Alcoholic Beverage Control Law, §17, subd. 7, and §106, subd. 15, permit representatives of the State Liquor Authority to inspect any and all premises where alcoholic beverages are manufactured or sold. Chief Judge Fuld

in the court's opinion, after citing *See* and *Camara*, continued:

> "* * * In *See* (387 U.S. 541, *supra*), the Supreme Court invalidated a local ordinance which, similar to the provisions relied upon by the Authority, required owners of business establishments to permit administrative inspections of their premises without a warrant. The court held that, with respect to those portions of business property not open to the public, the Fourth Amendment protections apply. In reaching that conclusion, the court declared (p. 543):
>
> > " 'The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.'
>
> "Although the court did indicate that the Constitution might not inhibit certain narrowly defined inspection procedures (cf. *Colonnade Catering Corp.* v. *United States*, 410 F. 2d 197), the implication of the decision in the *See* case is clear. No State may require, as a condition of doing business, a blanket submission to warrantless searches at any time and for any purpose. Applying this principle to the present case, it follows that the investigator's entry into the back room of the store and, particularly, his search of the coat may not be constitutionally justified." 24 N. Y. 2d at 658.

## Conclusion

It is respectfully submitted that just as the New York Court of Appeals in *Finn's Liquor Shop, Inc.* v. *State Liquor Authority,* 24 N.Y. 2d 647 (1969), applied *See* v. *City of Seattle,* 387 U.S. 541 (1967), to warrantless seizures by inspectors of the New York State Liquor Authority, so the Court should grant certiorari in the instant case and hold *See* applicable to warrantless seizures by agents of the Internal Revenue Service.

Respectfully submitted,

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THE COLONNADE CATERING CORP.,
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# TABLE OF CONTENTS


| | PAGE |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| QUESTION PRESENTED | 2 |
| CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED | 2 |
| Fourth Amendment | 2 |
| 26 U.S.C. §5121(a) | 3 |
| 26 U.S.C. §5146(b) | 3 |
| 26 U.S.C. §7342 | 3 |
| 26 U.S.C. §7606(a) | 4 |
| Rule 41(e) of the Federal Rules of Criminal Procedure | 4 |
| STATEMENT OF THE CASE | 4 |
| SUMMARY OF ARGUMENT | 7 |
| ARGUMENT— | |
| The forcible breaking and entering by agents of the Internal Revenue Service into the locked liquor storeroom of the petitioner (a caterer with a federal retail dealer's occupational tax stamp), and the warrantless search of this storeroom and seizure from it of a quantity of bottled liquor violated the Fourth Amendment | 8 |
| CONCLUSION | 23 |

## TABLE OF AUTHORITIES


PAGE

*Cases:*

Alderman v. United States, 394 U.S. 165 (1969) ..... 9

Berd v. Lovelace, Cary 62, 21 Eng. Rep. 33 (1576-1577) ..... 20
Berger v. New York, 388 U.S. 41 (1967) ..... 18
Boyd v. United States, 116 U.S. 616 (1886) ..... 17

Camara v. Municipal Court, 387 U.S. 523 (1967) ..... 10, 11, 13, 21

Davis v. Mississippi, 394 U.S. 721 (1969) ..... 19
Dennis v. Codringham, Cary 100, 21 Eng. Rep. 53 (1579-1580) ..... 20

Entinck v. Carrington, 2 Wils, K. B. 275, 291, 95 Eng. Rep. 807, 817, 818 (1765) ..... 15, 17

Finn's Liquor Shop, Inc. v. State Liquor Authority, 24 N.Y.2d 647, 301 N.Y.S.2d 584, 249 N.E.2d 440 (1969) ..... 21
Frank v. Maryland, 359 U.S. 360 (1959) ..... 10, 11, 20

Gardner v. Broderick, 392 U.S. 273 (1968) ..... 20
Garrity v. New Jersey, 385 U.S. 493 (1967) ..... 20
Griswold v. Connecticut, 381 U.S. 479 (1965) ..... 19
Groban, In re, 352 U.S. 330 (1957) ..... 16

Jackson, Ex parte, 96 U.S. 727 (1877) ..... 18
Jones v. United States, 362 U.S. 257 (1960) ..... 19

Katz v. United States, 389 U.S. 347 (1967) ..... 8, 9, 18, 19
Kelway v. Kelway, Cary 89, 21 Eng. Rep. 47 (1579-1580) ..... 20

Lady Ivy's Trial, 10 How. St. Tr. 555 (1684) ..... 20

PAGE

Mancusi v. DeForte, 392 U.S. 364 (1968) ..... 8
Mapp v. Ohio, 367 U.S. 643 (1961) ..... 18, 21

Olmstead v. United States, 277 U.S. 438 (1928) ..... 17, 18

Paxton's Case ..... 16
People ex rel. Attorney General v. Lansing Municipal Judge, 327 Mich. 410, 42 N.W. 2d 120 (1950) ..... 20

Rios v. United States, 364 U.S. 253 (1960) ..... 19

See v. City of Seattle, 387 U.S. 541 (1967) ..... 10, 11, 13, 19, 21, 23

Semayne's Case, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (1603) ..... 13
Shapiro v. United States, 335 U.S. 1 (1948) ..... 23
Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) ..... 19
Spevack v. Klein, 385 U.S. 511 (1967) ..... 20
Stanley v. Georgia, 394 U.S. 537 (1969) ..... 19
Stoner v. California, 376 U.S. 483 (1964) ..... 19

Uniformed Sanitation Men v. Comm'r of Sanitation, 392 U.S. 28 (1968) ..... 20
United States v. Frisch, 140 F.2d 600 (5th Cir. 1944) 11
United States v. Stanack Sales Co., 387 F.2d 849 (3d Cir. 1968) ..... 21

Wattenberg v. United States, 388 F.2d 853 (9th Cir. 1968) ..... 19
Wolf v. Colorado, 338 U.S. 25, 27 (1949) ..... 18

Zap v. United States, 328 U.S. 624 (1946) ..... 22

PAGE

***United States Constitution:***

Fourth Amendment ..... 2, 7, 10, 17, 19, 20
Fifth Amendment ..... 23

***Statutes:***

26 U.S.C. §5121(a) ..... 3
26 U.S.C. §5146(b) ..... 3, 6, 20
26 U.S.C. §7342 ..... 3, 20
26 U.S.C. §7606(a) ..... 4, 6, 20
28 U.S.C. §1254(1) ..... 2

***Other Authorities:***

1 Brougham, *Historical Sketches of Statesmen Who Flourished in the Time of George III* 42 (1958) .... 13
3 Coke, *Institutes* *162 ..... 13
4 Coke, *Institutes* *176-*77 ..... 14
2 Hale, *The History of the Pleas of the Crown* 113 14
3 May, *Constitutional History of England* 6, 7 (7th ed. 1882) ..... 14
8 *Old South Leaflets* 57 (No. 179) ..... 17
Rogge, *Inquisitions by Officials: A Study of Due Process Requirements in Administrative Investigations*—I, 47 Minn. L. Rev. 939 (1963); II, 48 Minn. L. Rev. 557 (1964); III, 48 Minn. L. Rev. 1081 (1964) ..... 12
Tudor, *Life of James Otis*, 63 (1823) ..... 16
Wilkes, *North Britain*, No. 45 ..... 14
2 *The Works of John Adams* App. 523, 524 (Chas. Francis Adams ed. 1850) ..... 16

IN THE

# Supreme Court of the United States

October Term, 1969

No. 108

THE COLONNADE CATERING CORP.,
*Petitioner,*

*against*

UNITED STATES OF AMERICA,
*Respondent.*

## PETITIONER'S BRIEF

### Opinions Below

The United States Court of Appeals for the Second Circuit rendered an opinion written by District Judge Walter R. Mansfield, of the Southern District of New York, sitting by designation. It is reproduced in the Single Appendix, pp. 43a-57a. This opinion is reported at 410 F.2d 197 (2d Cir. 1969).

The United States Court of Appeals for the Second Circuit reversed a memorandum and order of June 28,

1968 of District Judge Jack B. Weinstein of and for the United States District Court for the Eastern District of New York, granting the petitioner's request for the return of a quantity of its bottled liquor seized by agents of the Internal Revenue Service. Judge Weinstein's memorandum and order are reproduced in the Single Appendix, pp. 38a-42a. His memorandum was not reported.

## Jurisdiction

The United States Court of Appeals for the Second Circuit entered its judgment on March 26, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) by a petition for a writ of certiorari filed on May 13, 1969. The Court granted certiorari on October 13, 1969.

## Question Presented

Did the forcible breaking and entering by agents of the Internal Revenue Service into the locked liquor storeroom of the petitioner (a caterer with a federal retail liquor dealer's occupational tax stamp), and the warrantless search of this storeroom and seizure from it of a quantity of bottled liquor violate the Fourth Amendment?

## Constitutional, Statutory and Other Provisions Involved

### Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall

issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**26 U.S.C. §5121(a)**

**Imposition and rate of tax**

**(a) Retail dealers in liquors.** Every retail dealer in liquors shall pay a special tax of $54 a year. * * *

**26 U.S.C. §5146(b)**

**Preservation and inspection of records, and entry of premises for inspection**

* * *

**(b) Entry of premises for inspection.**—The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises.

**26 U.S.C. §7342**

**Penalty for refusal to permit entry or examination**

Any owner of any building or place, or person having the agency or superintendence of the same, who refuses to admit any officer or employee of the Treasury Department acting under the authority of section 7606 (relating to entry of premises for examination of taxable articles) or refuses to permit him to examine such article or articles, shall, for every such refusal, forfeit $500.

**26 U.S.C. §7606(a)**

**Entry of premises for examination of taxable objects**

**(a) Entry during day.**—The Secretary or his delegate may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects.

**Rule 41(e) of the Federal Rules of Criminal Procedure**

**Search and Seizure**

* * *

**(e) Motion for return of Property and to Suppress Evidence.** A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant * * *.

## Statement of the Case

The petitioner initiated this proceeding under Rule 41(e) of the Federal Rules of Criminal Procedure in the United States District Court for the Eastern District of New York, District Judge Weinstein presiding, for the return to it of some bottled liquor which agents of the Internal Revenue Service illegally seized from its locked liquor storeroom after a warrantless and forcible entry without its consent, as well as over its objections. District Judge Weinstein in a memorandum and order of June 28,

1968 granted the petitioner's motion for the return of its illegally seized property. In two paragraphs of his memorandum he stated the facts:

> The facts are undisputed. The petitioner, Colonnade Catering Corp., conducts a catering business and has a New York State liquor license. While a party was in progress, three Internal Revenue Service special investigators accompanied by a Nassau County policeman arrived at petitioner's premises at approximately 4:00 P.M. on May 18, 1968. (One of the Internal Revenue investigators, while a guest at petitioner's premises the previous week, had noted possible violations of the excise tax law.) They had no search warrant.
>
> After looking around the ballroom (a search which led to no seizures and the legality of which is not in issue here), the investigators demanded that the petitioner's locked liquor storeroom — located approximately seventy-five feet from the entrance to the ballroom — be opened for their inspection. Petitioner's president, the only person authorized to unlock the storeroom, refused. The investigators, who had been joined by the Internal Revenue Service area supervisor, forcibly broke into the storeroom and removed fifty-three bottles of liquor. No arrest was made then or since (38a-39a).

These facts come from the petitioner's affidavits, and a statement to District Judge Weinstein during the course of argument before him (31a-32a). The government's conclusory affidavit, by an assistant United States attorney without any personal knowledge of the facts, contains nothing, as this paragraph from it demonstrates:

> The facts of this case and the law governing these facts are fully set forth in the Government's Memorandum of Law which is submitted herewith. Upon

> information and belief and after conversations with the Special Investigators involved in this case, it is submitted that the inspection, examination and seizure here complained of were authorized by statute and were lawful in all respects (76a).

After Judge Weinstein's memorandum and order of June 28, 1968, the government took the case to the Second Circuit. Both parties as well as the Second Circuit treated this appeal as if it were under 18 U.S.C. §3731, as amended by section 1301(a) of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 237.

In this Court in its brief in opposition to the petition for a writ of certiorari, the government conceded (at p. 6) that no appeal lay under 18 U.S.C. §3731. However, the government took the position that the Second Circuit had jurisdiction over the government's appeal under 28 U.S.C. §1291. The petitioner agrees. Thus the only issue in the case is whether the warrantless search and seizure by agents of the Internal Revenue Service violated the Fourth Amendment.

On this issue the Second Circuit reversed District Judge Weinstein on the ground that 26 U.S.C. §§5146(b) and 7606(a), providing for administrative inspections by representatives of the Treasury Department, resulted in an advance waiver of petitioner's rights under the Fourth Amendment. The petitioner takes the position that these statutory provisions are not susceptible of such a construction; and that if they were, then they themselves would violate the Fourth Amendment.

## Summary of Argument

In the past century there has been a great growth in the number of administrative agencies. Some of these agencies have been empowered to issue subpoenas. Some have been empowered to make inspections. Some have been empowered to do both. However, to protect our ancient liberties, the exercise of such powers should be held to be subject to the provisions of the Fourth Amendment. The detached scrutiny and the consequent deliberate, impartial judgment of a judicial officer should be placed between the administrative agency and the individual. An inspection without consent by an administrative agency should not be sanctioned unless there has been a compliance with the requirements of the Fourth Amendment. The founding fathers put those requirements into the Fourth Amendment in order to safeguard to the individual a certain area that is sacred to him. Administrative agencies as well as other organs of government should respect those safeguards.

## ARGUMENT

**The forcible breaking and entering by agents of the Internal Revenue Service into the locked liquor storeroom of the petitioner (a caterer with a federal retail dealer's occupational tax stamp), and the warrantless search of this storeroom and seizure from it of a quantity of bottled liquor violated the Fourth Amendment.**

In accordance with the spirit of our law, embodied in constitutions and bills of rights, we guarantee to the individual a certain area, physical as well as mental, that is free from intrusion by the government. The Fourth Amendment is part of this guarantee.

As the Court stated through Mr. Justice Stewart in *Katz* v. *United States,* 389 U.S. 347 (1967), where the Court held a public telephone booth to be within the protection of the Fourth Amendment:

> • • • searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions. 389 U.S. at 357.

Or as the Court put it through Mr. Justice Harlan in *Mancusi* v. *DeForte,* 392 U.S. 364 (1968), where the Court gave standing to an indicted union official to object at his state trial to documents seized from the union office that he shared with others:

> • • • it is settled for purposes of the amendment that "except in certain carefully defined classes of cases, a search of private property without proper consent is

'unreasonable' unless it has been authorized by a valid search warrant." 392 U.S. at 370.

None of the few special exceptions is involved here.

Or yet again as Mr. Justice Fortas put it in Part II (in which Mr. Justice Douglas joined) of his opinion, concurring in part and dissenting in part, in *Alderman* v. *United States,* 394 U.S. 165 (1969):

> • • • The Fourth Amendment, unlike the Fifth, is couched in terms of a guarantee that the Government will not engage in unreasonable searches and seizures. It is a general prohibition, a fundamental part of the constitutional compact, the observance of which is essential to the welfare of all persons. 394 U.S. at 205.

The reason for the requirement of a warrant is to interpose the detached scrutiny and the consequent deliberate, impartial judgment of a judicial officer between the individual and government agents. As the Court put it through Mr. Justice Stewart, in *Katz* v. *United States,* 389 U.S. 347 (1967), referring to the governmental agents in that case:

> • • • They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. • • •
>
> • • •
>
> • • • And bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from Fourth Amendment violations "only in the discretion of the police." *Id.* at 97.
>
> These considerations do not vanish when the search in question is transferred from the setting of a home,

> an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. * * * 389 U.S. at 356, 358-59.

Thus in the companion cases of *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), and *See* v. *City of Seattle,* 387 U.S. 541 (1967), where the Court noted probable cause "to re-examine whether administrative inspection programs, as presently authorized and conducted, violate Fourth Amendment rights" (387 U.S. at 525), the Court held that they did; and overruled *Frank* v. *Maryland,* 359 U.S. 360 (1959) "to the extent that it sanctioned such warrantless inspections" (387 U.S. at 528). In *Camara,* which involved a residence, the Court through Mr. Justice White reasoned:

> * * * The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasion by governmental officials. * * *
>
> * * *
>
> * * * except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant. * * *
>
> * * *
>
> In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reason put forth in *Frank* v. *Maryland* and in other cases for upholding these warrantless

searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections. * * * 387 U.S. at 528, 528-29, 534.

In *See*, which involved commercial premises, the Court through Mr. Justice White added:

> We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure. * * * 387 U.S. at 545.

Even in *Frank* v. *Maryland*, 359 U.S. 360 (1959), which the Court overruled in *Camara* to the extent that it sanctioned warrantless inspections, the Court pointed out that the administrative official there involved could not make a forcible entry:

> * * * Moreover, the inspector has no power to force entry and did not attempt it. A fine is imposed for resistance, but officials are not authorized to break past the unwilling occupant. 359 U.S. at 366-67.

In addition, a Fifth Circuit case may be cited as *contra* to the Second Circuit's decision in the instant case. *United States* v. *Frisch*, 140 F.2d 600 (5th Cir. 1944).

It is also relevant to note that the reach of the Fourth Amendment extends not only to administrative inspections, but also to administrative subpoenas: once again judicial review is interposed between the individual and the administrative agency. As the Court stated through Mr. Justice White in *See* v. *City of Seattle*, 387 U.S. 541, 544-45:

> It is now settled that, when an administrative agency subpoenas corporate books or records, the

Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. The agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute, but it must delimit the confines of a search by designating the needed documents in a formal subpoena. In addition, while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply.

It is these rather minimal limitations on administrative action which we think are constitutionally required in the case of investigative entry upon commercial establishments. The agency's particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved. But the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field. Given the analogous investigative functions performed by the administrative subpoena and the demand for entry, we find untenable the proposition that the subpoena, which has been termed a "constructive" search, *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 202, is the subject to Fourth Amendment limitations which do not apply to actual searches and inspections of commercial premises.

For a collection of many cases, state as well as federal, see Rogge, *Inquisition by Officials: A Study of Due Process Requirements in Administrative Investigations*—I, 47 Minn.

L. Rev. 939 (1963); II, 48 Minn. L. Rev. 557 (1964); III, 48 Minn. L. Rev. 1081 (1964).

We submit that *Camara* and *See* are dispositive of the case at bar.

For the past 300 years and more, powerful voices among us have pointed out the importance of guaranteeing to the individual a certain area that is free from intrusion by the state. As early as 1603 in *Semayne's Case,* 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (1603), the court stated: "That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose * * *."

Coke in his *Institutes* wrote that a man's house was his castle. 3 INST. *162.

The elder Pitt, Lord Chatham, declared movingly in the reign of George III: "The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail —its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter!—all his force dares not cross the threshold of the ruined tenement!" 1 Brougham, *Historical Sketches of Statesmen Who Flourished in the Time of George III* 42 (1858).

The practice of issuing search warrants arose in England in the middle of the 1600s. Before that time Coke in his *Institutes* stated that in the absence of an indictment justices of the peace had no power to issue a warrant "to search for a felon, or for stolen goods, for they being

created by an act of parliament have no such authority granted unto them by any act of parliament." 4 *Inst.* *176-*77. But after the middle of the century Matthew Hale expressed a contrary opinion:

> In case of a complaint and oath of goods stolen, and that he suspects the goods are in such a house, and shews the cause of his suspicion, the justice of peace may grant a warrant, and to attach the goods and the party in whose custody they are found, and bring them before him or some justice of peace to give an account how he came by them, and farther to abide such order as to law shall appertain. * * *

2 Hale, *The History of the Pleas of the Crown* 113 (published by Emlyn from the original manuscripts, Wilson ed. 1778).

Search warrants were used originally to recover stolen property. With the passage of the Licensing Act of 1662 for publications, the crown took to the use of these warrants in a general form to search for writings alleged to be seditious and for their authors, printers, and publishers. It was such a warrant which was used against John Wilkes and No. 45 of his paper the *North Britain*. This number came out in April 1763 and contained a biting criticism of George III's message to Parliament. The king's ministers regarded it as a seditious libel and Lord Halifax, one of the secretaries of state, issued a general warrant. This warrant was ruled to be illegal, and the various resulting actions against the king's messengers were estimated to have cost the government as much as 100,000 pounds. 3 May, *Constitutional History of England* 6, 7 (7th ed. 1882). Wilkes recovered 4000 pounds from Lord Halifax himself.

Not long thereafter Lord Halifax furnished the court with another opportunity to consider general warrants. This time the offending publication was *The Monitor,* or *British Freeholder.* The warrant differed from that used against Wilkes in that it named the person, John Entinck, whose effects were to be seized, but it put no restrictions upon the officers as to the scope of the search. Entinck sued those who conducted the raid. The jury found a special verdict, stating the facts of the raid but setting up that such warrants had been in common use. Lord Camden, with the unanimous concurrence of the other judges of the court, ruled that general search warrants were illegal. To permit them, he reasoned, "would destroy all the comforts of society." *Entinck* v. *Carrington,* 2 Wils, K. B. 275, 291, 95 Eng. Rep. 807, 817, 818 (1765). According to the report of the case in 19 How. St. Tr. 1029, Lord Camden stated that to sanction the practice of issuing general search warrants "would be subversive of all the comforts of society." At 1066.

Just as in the mother country so in the colonies there was objection to general searches. However, in the colonies the resistance was to searches for goods on which duties had not been paid rather than for publications. Parliament at the same session in 1662 in which it enacted a licensing act for publications, passed equally drastic measures for the enforcement of the revenue laws. The chief weapon of enforcement was the writ of assistance. This was a blanket permit issuable to anyone, authorizing him to search any suspected place. The only limitation was that the search had to be in the daytime. Proceedings under this statute appear to have aroused little opposition

in England; but in the colonies, where taxation was none too popular irrespective of the methods of collection, the story was otherwise. In the course of time determined opposition arose. In 1761 in Massachusetts the legality of writs of assistance was questioned in *Paxton's Case.* The advocate general for the crown was James Otis and as such it became his duty to argue for their validity. Instead he resigned his office and took the other side of the case. In a masterful address he denounced writs of assistance as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in an English law book." 2 *The Works of John Adams* App. 523 (Chas. Francis Adams ed. 1850); Tudor, *Life of James Otis* 63 (1823). He further declared that they would place "the liberty of every man in the hands of every petty officer." 2 *The Works of John Adams* App. 524 (Chas. Francis Adams ed. 1850); Tudor, *Life of James Otis* 66 (1823). Mr. Justice Black quoted this poignant comment in his dissenting opinion in *In re Groban,* 352 U.S. 330, 338 (1957).

The judges in *Paxton's Case* almost convinced by Otis's argument sent to England for advice; but subsequently in obedience to orders from the ministry, recognized the writs.

Although the case was lost, the cause was not. John Adams, who heard Otis's argument, later wrote:

> Every man of a crowded audience appeared to me to go away as I did, ready to take up arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great

Britain. Then and there the child independence was born.

Letter to William Tudor, March 29, 1817, printed in 8 *Old South Leaflets* 57, 60 (no. 179, p. 4).

Justice Bradley subsequently stated in his opinion for the Court in *Boyd* v. *United States,* 116 U.S. 616, 626 (1886), that Lord Camden's "great judgment in that occasion [*Entinck* v. *Carrington,* 2 Wils, K. B. 275, 291, 95 Eng. Rep. 807, 817, 818, 19 How. St. Tr. 1029 (1765)] is considered as one of the landmarks of English liberty."

In *Boyd,* the Court held that a provision of an act of Congress which required, in the words of the Court, "a compulsory production of a man's private papers in a proceeding to forfeit his property for alleged fraud against the revenue laws" violated the Fourth Amendment's prohibition of unreasonable searches and seizures. Justice Bradley explained:

> • • • And any compulsory discovery by extorting the party's oath or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom. 116 U.S. at 631-32.

In the same vein Justice Brandeis wrote in his dissenting opinion in *Olmstead* v. *United States,* 277 U.S. 438 (1928):

> • • • The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness.

> They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. * * * 277 U.S. at 478.

The *Olmstead* case was questioned in *Berger* v. *New York,* 388 U.S. 41 (1967) and overruled in *Katz* v. *United States,* 389 U.S. 347 (1967). Mr. Justice Douglas in his concurring opinion in *Berger* stated that *Berger* overruled *Olmstead sub silentio.* 388 U.S. at 64.

In the same vein the Court wrote in *Wolf* v. *Colorado,* 388 U.S. 25, 27 (1949):

> The security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society.

The actual holding in *Wolf,* that material illegally seized by state officers was admissible in a state court proceeding, was overruled in *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

Today the reach of the Fourth Amendment, of the right to be let alone by the government (to paraphrase the language of Justice Brandeis in his dissenting opinion in *Olmstead*), extends far beyond one's home. It extends to a sealed letter entrusted to the mail. *Ex parte Jackson,* 96

U.S. 727 (1877). It extends to an individual in a business office. *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1920). It extends to one in a friend's apartment. *Jones* v. *United States,* 362 U.S. 257 (1960). It extends to one in a taxicab. *Rios* v. *United States,* 364 U.S. 253 (1960). It extends to a guest in a hotel room. *Stoner* v. *California,* 376 U.S. 483 (1964). It extends to a person in a public telephone booth. *Katz* v. *United States,* 389 U.S. 347 (1967). It extends to police detention for the purpose of taking fingerprints. *Davis* v. *Mississippi,* 394 U.S. 721 (1969). It extends to an open field adjacent to one's house which one seeks to preserve as private. *Wattenberg* v. *United States,* 388 F.2d 853 (9th Cir. 1968). And it extends to commercial premises which are not open to the public. *See* v. *City of Seattle,* 387 U.S. 541 (1967).

The approach of the Fourth Amendment, that of guaranteeing to the individual a certain area that is free from intrusion by the government, expresses itself in many other ways than a proscription of unreasonable searches and seizures. It expresses itself, for instance, in giving a right to an individual to have pornography in his own home. *Stanley* v. *Georgia,* 394 U.S. 557 (1969). It expresses itself, for instance, in protecting a husband and wife in the practice of contraception. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965).

The approach behind the Fourth Amendment, that of guaranteeing to the individual a certain area that is free from intrusion by the government, has helped to bring about the protection of confidential relationships such as those between attorney and client, and husband and wife. The protection of the confidential communications between

attorney and client goes back to the reign of Elizabeth I. *Berd* v. *Lovelace,* Cary 62, 21 Eng. Rep. 33 (1576-1577); *Kelway* v. *Kelway,* Cary 89, 21 Eng. Rep. 47 (1579-1580); *Dennis* v. *Codringham,* Cary 100, 21 Eng. Rep. 53 (1579-1580). Similar protection to the confidential communications between husband and wife may be traced back to a case as early as 1684. *Lady Ivy's Trial,* 10 How. St. Tr. 555, 628 (1684).

However, the government contended, and the Second Circuit agreed (53a-57a), that the inspection provisions of 26 U.S.C. §§5146(b) and 7606(a) resulted in a waiver of petitioner's Fourth Amendment rights. We submit on the contrary that these sections do not have any such result. It may also be observed that, as in *Frank* v. *Maryland,* 359 U.S. 360 (1959), 26 U.S.C. §7342 provides for a fine of $500 for a refusal to permit an examination under 26 U.S.C. §7606.

Furthermore, if sections 5146(b) and 7606(a) were to have any such result as the waiver of petitioner's Fourth Amendment rights, these sections would themselves be unconstitutional as violating that amendment.

Whether there may be a waiver of a federal constitutional right, to operate not contemporaneously but *in futuro,* is at least an open question. The Court adumbrated the question in *Gardner* v. *Broderick,* 392 U.S. 273, 278-79 (1968), and *Uniformed Sanitation Men* v. *Comm'r of Sanitation,* 392 U.S. 280, 284 n. 5 (1968), but did not reach it. See also *Spevack* v. *Klein,* 385 U.S. 511 (1967), and *Garrity* v. *New Jersey,* 385 U.S. 493 (1967).

The Supreme Court of Michigan did decide the question. It held in *People ex rel. Attorney General* v. *Lansing Mu-*

*nicipal Judge,* 327 Mich. 410, 42 N.W. 2d 120 (1950), that a statutory provision permitting conservation officers to make certain wild life inspections without a warrant, was unconstitutional as permitting unreasonable searches and seizures. The Court reasoned:

> Under Michigan law a man may not marry a wife, operate a motor vehicle on the highways, practice law, or a number of other things, without a license from the State. May the legislature condition the granting of such licenses upon the applicant's waiver of his constitutional rights against unreasonable search of his home, marital chamber, automobile, law office or other place where a licensed activity occurs? * * *

327 Mich. at 431, 42 N.W. 2d at 125. *Cf. United States* v. *Stanack Sales Co.,* 387 F.2d 849 (3d Cir. 1968), where the Third Circuit applied *See* v. *City of Seattle,* 387 U.S. 541 (1967), to inspectors of the Food and Drug Administration; and refused to find a waiver of Fourth Amendment rights.

To the same effect as the Michigan case is *Finn's Liquor Shop, Inc.* v. *State Liquor Authority,* 24 N.Y. 2d 647, 301 N.Y.Supp. 2d 584, 249 N.E. 2d 440 (1969). There the New York Court of Appeals applied *See* v. *City of Seattle,* 387 U.S. 541 (1967), *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), as well as *Mapp* v. *Ohio,* 367 U.S. 643 (1961), to a warrantless search and seizure by inspectors of the New York State Liquor Authority, despite the fact that New York Alcoholic Beverage Control Law, §17, subd. 7, and §106, subd. 15, permit representatives of the State Liquor Authority to inspect any and all premises where alcoholic beverages are manufactured or sold. Chief Judge Fuld in the court's opinion, after citing *See* and *Camara,* continued:

> * * * In *See* (387 U.S. 541, *supra*), the Supreme Court invalidated a local ordinance which, similar to

the provisions relied upon by the Authority, required owners of business establishments to permit administrative inspections of their premises without a warrant. The court held that, with respect to those portions of business property not open to the public, the Fourth Amendment protections apply. In reaching that conclusion, the court declared (p. 543):

> "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant."

Although the court did indicate that the Constitution might not inhibit certain narrowly defined inspection procedures (cf. *Colonnade Catering Corp.* v. *United States,* 410 F. 2d 197), the implication of the decision in the *See* case is clear. No State may require, as a condition of doing business, a blanket submission to warrantless searches at any time and for any purpose. Applying this principle to the present case, it follows that the investigator's entry into the back room of the store and, particularly, his search of the coat may not be constitutionally justified. 24 N.Y. 2d at 658, 301 N.Y.S. 2d at 591, 249 N.E. 2d at 445.

The government, and the Second Circuit (51a), relied on *Zap* v. *United States,* 328 U.S. 624 (1946). Whatever that case may say, there was involved no forcible entry. As the Court itself stated:

> * * * No force or threat of force was employed. Indeed, the inspection was made with the full cooperation of petitioner's staff. * * *

> • • • They [the governmental agents] did not obtain access by force, fraud, or trickery. • • • 328 U.S. at 628, 629.

The government, and the Second Circuit (54a), also relied on *Shapiro* v. *United States,* 335 U.S. 1 (1948). *Shapiro* is a Fifth Amendment case where the Court created a required records exception to the privilege against self-incrimination. To the extent that the language in that case, a five-to-four decision of more than two decades ago, may be thought to support a waiver *in futuro* of constitutional rights, the case is due for re-examination.

## Conclusion

Just as writs of assistance in colonial days, so warrantless inspections by agents of the Internal Revenue Service today, would (in the living words of James Otis in his argument against the legality of writs of assistance) place "the liberty of every man in the hands of every petty officer". The Court should hold *See* v. *City of Seattle,* 387 U.S. 541 (1967), applicable to warrantless forcible entries and the resultant illegal searches and seizures by federal officials, reverse the judgment of the Second Circuit, and affirm that of the District Court.

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# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 1 |
| Statutes involved | 2 |
| Statement | 2 |
| Introduction and summary of argument | 5 |
| Argument | 7 |
| I. The authority granted by Congress to internal revenue agents to make warrantless inspections of the premises of registered liquor dealers in order to determine if the distilled spirits kept on those premises are being maintained in accord with statutory requirements, is not violative of the Fourth Amendment | 7 |
| A. Since long before the adoption of the Fourth Amendment the liquor industry has been subject to strict governmental inspection of the premises on which it is conducted | 7 |
| B. The decisions in *Camara* and *See* do not require invalidation of Congress' authorization of warrantless inspection of the premises of liquor dealers | 17 |
| II. The inspection here was not violative of the statutory scheme nor was the search rendered unreasonable by the breaking of the storeroom lock | 29 |
| Conclusion | 35 |
| Appendix | 37 |




372-507—70——1

CITATIONS

Cases:


| | Page |
|---|---|
| *Boyd* v. *United States*, 116 U.S. 616 | 15, 16, 23 |
| *Camara* v. *Municipal Court*, 387 U.S. 523 | 4, 5, 6, 7, 17, 18, 19, 20, 21, 22, 24, 26, 27, 28, 29 |
| *Compagnie Francaise* v. *Board of Health*, 186 U.S. 380 | 27 |
| *Davis* v. *United States*, 328 U.S. 582 | 23 |
| *Fields* v. *United States*, 355 F. 2d 543, petition for certiorari dismissed, 384 U.S. 935 | 33 |
| *Finn's Liquor Shop, Inc.* v. *State Liqour Authority*, 24 N.Y. 2d 647, 249 N.E. 2d 440 | 25, 34 |
| *Jacobson* v. *Massachusetts*, 197 U.S. 11 | 27 |
| *Katz* v. *United States*, 389 U.S. 347 | 4, 23 |
| *Kroplin* v. *Traux*, 119 Ohio St. 610, 165 N.E. 498 | 28 |
| *License Tax Cases*, 5 Wall. 462 | 11, 13 |
| *Mancusi* v. *De Forte*, 392 U.S. 364 | 23 |
| *Miller* v. *United States*, 357 U.S. 301 | 32, 33 |
| *North American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306 | 27 |
| *Peeples* v. *United States*, 341 F. 2d 60, certiorari denied, 380 U.S. 988 | 23, 24 |
| *Ray* v. *United States*, 374 F. 2d 638, certiorari denied, 389 U.S. 833 | 23 |
| *Terry* v. *United States*, 392 U.S. 1 | 28 |
| *Sabbath* v. *United States*, 391 U.S. 585 | 32 |
| *See* v. *City of Seattle*, 387 U.S. 541 | 4, 5, 6, 7, 17, 18, 19, 20, 21, 22, 23, 26, 28, 29, 32 |
| *Semayne's Case*, 5 Coke 91, 77 Eng. Rep. 194 | 33 |
| *United States* v. *Frisch*, 140 F. 2d 660 | 34 |
| *United States* v. *Hassell*, 336 F. 2d 684 | 33 |
| *United States* v. *Ulrici*, 111 U.S. 38 | 12 |
| *Zap* v. *United States*, 328 U.S. 624, vacated on other grounds, 330 U.S. 800 | 23 |

Constitution, statutes, and rule:


| | Page |
|---|---|
| United States Constitution, Fourth Amendment | 4, 5, 6, 7, 10, 12, 15, 17, 18, 20, 26, 32 |
| Act of March 3, 1791, 1 Stat. 199 *et seq.*: | |
| Sec. 26 | 11 |
| Sec. 29 | 10 |
| Sec. 32 | 11 |
| Act of July 24, 1813, Section 5, 3 Stat. 42 | 11 |
| Act of June 30, 1864, Section 79, part five, 13 Stat. 223 *et seq* | 13 |
| Act of July 20, 1868, 15 Stat. 131 | 12 |
| 15 Stat. 130, Section 15; Rev. Stat. § 3271 (2d ed. 1878) | 12 |
| 15 Stat. 139, Section 32; Rev. Stat. § 3276 (2d ed. 1878) | 12 |
| 15 Stat. 141, Sec. 38; Rev. Stat. § 3252 (2d ed. 1878) | 12 |
| 18 U.S.C. 3109 | 33 |
| 18 U.S.C. 3731 | 4 |
| 26 U.S.C.: | |
| 3601 (1952 ed.) | 13 |
| 5121(a) | 3, 17, 37 |
| 5122(a) | 17, 37 |
| 5146(b) | 4, 14, 17, 24, 34, 37 |
| 5203(b) | 12 |
| 5301(c) | 13, 14, 22, 37 |
| 7212(a) | 12, 30 |
| 7323 | 31 |
| 7342 | 30, 31, 38 |
| 7401 | 31 |
| 7606 | 4, 14, 24, 31, 34, 38 |
| 28 U.S.C. 1291 | 4 |
| Act of October 10, 1977 (Mass. Bay Colony) | 9 |
| Act of June 8, 1692 (Mass. Bay Colony) | 10 |
| San Francisco City Housing Code, Section 503 | 18 |
| Seattle Fire Code, Section 8.01.140 | 18 |
| Act of 3 Geo. 3, c. 11 | 9 |

Constitution, statutes and rule—Continued
Page
Act of 7 Geo. 3, c. 12:
§ 10 ..... 9
§ 14 ..... 9
Act of 5 & 6 Edw. 6, c. 25 ..... 8
Act of 12 Car. 2, c. 23, § 19 ..... 8
Act of 13 & 14 Car. 2, c. 11, § 5 ..... 10
Customs and Excise Act of 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 44, § 131(5) ..... 15
Licensing Act of 1627, 3 Car. 1, c. 3 ..... 8, 9
Licensing Act of 1953, 1 & 2 Eliz. 2, c. 46, § 131(1) ..... 15
R. S. 3177 (Rev. Stat., 2d ed., 1878) ..... 13
Miscellaneous:
Bureau of Internal Revenue Service, Monographs of the United States Government, No. 25, pp. 27–28 ..... 12
Byse, *Alcoholic Beverage Control Before Repeal*, 7 Law and Contem. Prob. 544–545 (1940) ..... 9
H. Rep. No. 1337, 83d Cong., 2d Sess. ..... 13
Hansard, *Parliamentary History of England* (1813), vol. 15 ..... 8, 9
Howie, *Three Hundred Years of the Liquor Problem in Massachusetts*, 18 Mass. L.Q. 75, (May, 1933) ..... 9
Internal Revenue Service, Fiscal 1968, *Alcoholic and Tobacco Summary Statistics*, (1969) ..... 12, 17
Porritt, *Five Centuries of Liquor Legislation in England*, 10 Pol. Sci. Q. 615 (1895) ..... 8
S. Rep. No. 1622, 83d Cong., 2d Sess. ..... 13
S. Rep. No. 2090, 85th Cong., 2d Sess. ..... 13, 15
5 Wilson, *A History of the American People*, 95 ..... 12
Wroth and Zobel, eds., *Legal Papers of John Adams, vol. 2* (1965) ..... 10

# In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 108

THE COLONNADE CATERING CORP., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the court of appeals (A. 43a–57a) is reported at 410 F. 2d 197. The memorandum opinion of the district court (A. 38a–42a) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on March 26, 1969. The petition for a writ of certiorari was filed on May 13, 1969, and certiorari was granted on October 13, 1969. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether agents of the Internal Revenue Service, acting under statutory inspection authority may, consonant with the Fourth Amendment standard of

reasonableness, inspect without a warrant during business hours distilled spirits on the business premises of a corporation holding a federal retail liquor dealer's occupational tax stamp.

2. Whether the inspection and seizure in this case were rendered unreasonable because the agents gained access to the portion of the premises in which the refilled bottles were found (a locked storeroom) by breaking the lock of the storeroom door after being refused entrance to the storeroom by the person in charge of the premises.

## STATUTES INVOLVED

The relevant provisions of the Internal Revenue Code are set out in the Appendix, *infra*, pp. 37–38.

## STATEMENT

At approximately 4:00 p.m., on Saturday, May 18, 1968, three special investigators of the Internal Revenue Service, Alcohol and Tobacco Tax Division, accompanied by a Nassau County policeman, entered the business premises of the petitioner, a catering establishment in Nassau County, New York (A. 5a, 25a). One of the federal agents had been a guest at a party on the same premises one week earlier and "had noted possible violations of the excise tax law" (A. 38a); at that time, he had observed what he thought were resealed bottles of liquor.[1]

Colonnade Catering Corp. was incorporated under the laws of the State of New York and was licensed

[1] Alteration of the contents of liquor bottles is prohibited by 26 U.S.C. 5301(c) (see Appendix, *infra* pp. 37–38).

by the State to serve alcoholic beverages (A. 5a). Colonnade was also the holder of a federal retail liquor dealer's occupational tax stamp as required by 26 U.S.C. 5121(a) (A. 24a; see Appendix, *infra* p. 37).

At the time of the agents' entry, a party was in progress in Colonnade's ballroom. With the consent of the banquet manager, the agents observed the activity in the ballroom where liquor was being served (A. 25a, 32a–33a). Without the manager's consent, the agents also inspected the cellar of the building (A. 25a). They then asked the manager to open the liquor storeroom, which was located about seventy-five feet from the ballroom (A. 20a–21a, 25a–26a). The manager said that the only person authorized to open the locked storeroom was Colonnade's president, Salvatore E. Rozzo, and that he was not on the premises at that time (A. 6a, 26a).

When Mr. Rozzo arrived shortly thereafter, he refused to open the storeroom (A. 26a). He asked the agents whether they had a search warrant, and was told that they did not and that they were entitled to inspect the storeroom without a warrant (A. 6a). When he continued to refuse to unlock the room, an agent broke the lock (A. 7a, 26a). The agents then entered the storeroom and removed fifty-three bottles of liquor, some full and others partially filled, and two funnels (A. 7a, 11a–15a). Thirty-eight bottles were seized as comparative samples, and fifteen bottles were seized to determine whether their contents were genuine (A. 11a–14a). Chemical tests on these fifteen

bottles were conducted by the agents on Colonnade's premises (A. 7a).

On May 28, 1968, Colonnade filed a petition in the United States District Court for the Eastern District of New York under Rule 41(e), Fed. R. Crim. P., seeking the return of the seized liquor and its suppression as evidence (A. 5a–15a). The district court, after a hearing, granted the petition. It held that, under this Court's decisions in *Camara* v. *Municipal Court,* 387 U.S. 523, and *See* v. *City of Seattle,* 387 U.S. 541, the search of the storeroom (which the court characterized as an area sought to be preserved as private under *Katz* v. *United States,* 389 U.S. 347) was invalid under the Fourth Amendment because of the absence of a search warrant (A. 38a–42a). On the government's appeal,[2] the court of appeals reversed, holding that the rationale of *Camara* and *See* does not require warrants for liquor inspections, such as were involved here, which are authorized by 26 U.S.C. 5146(b) and 7606 (see Appendix, *infra* pp. 37, 38). It reasoned that one who engages in the highly regulated business of a liquor dealer may reasonably be

[2] In our brief in opposition, we urged that the court of appeals had jurisdiction of the appeal under 28 U.S.C. 1291 even though the parties and the court of appeals believed that the appeal was authorized under 18 U.S.C. 3731 (Br. in Opp. 6–7). Petitioner now agrees that the court of appeals had such jurisdicition (Pet. Br. 6); accordingly, that issue is no longer in the case.

required to permit an inspection of his business premises during regular business hours by Internal Revenue agents proceeding without a warrant—in light of the fact that the narrowness and specificity of the statutory authorization serves the essential function of a warrant (A. 52a; 410 F. 2d at 202). The court rejected the claim that the use of force in gaining access to the storeroom in this case rendered the search and seizure unreasonable, noting that only the force necessary to break the lock was employed and that the agents used such force only after they had announced their authority and purpose and consent to their entry had nonetheless been denied (A. 56a; 410 F. 2d at 204).

## INTRODUCTION AND SUMMARY OF ARGUMENT

The thrust of petitioner's argument is that the decisions of this Court in *Camara* v. *Municipal Court,* 387 U.S. 523, and *See* v. *City of Seattle,* 387 U.S. 541, compel a holding that the warrantless inspection and seizure in this case, effected by forcible entry into petitioner's storeroom, was contrary to the Fourth Amendment. This contention puts into issue whether Congress has constitutional authority to establish a warrantless inspection procedure directed at the examination of distilled spirts on the premises of a registered retail liquor dealer. It is our submission that Congress has such authority. As we will show, the statutory scheme involved here stems from a long

history of close governmental supervision and control over the liquor industry, including a power of warrantless inspection, which had settled roots long before the adoption of the Fourth Amendment. We will further show that the rationale underlying *Camara* and *See*—that the warrant procedure of the Fourth Amendment is required where there is no demonstrable need for broad warrantless inspection authority and where the danger to the right of privacy inherent in such inspection schemes can be challenged only in a criminal prosecution for refusing to permit entry—does not apply here. We contend that the *Camara* and *See* decisions should not be extended to bar warrantless inspection where, as here, the inspection is directed at the commodity of a highly regulated industry, the businessmen involved in this industry cannot be unaware of the inspection authority granted by Congress, and the public interest in prompt action outweighs the minimal intrusion into privacy involved in the inspection.

The remaining issue is whether the method of inspection employed here—including the breaking of the storeroom lock—went beyond the bounds of reasonableness. As to this, it is our position that, in the circumstances, the agents acted within the scope of their statutory authority and consistently with constitutional requirements.

## ARGUMENT

### I

### THE AUTHORITY GRANTED BY CONGRESS TO INTERNAL REVENUE AGENTS TO MAKE WARRANTLESS INSPECTIONS OF THE PREMISES OF REGISTERED LIQUOR DEALERS IN ORDER TO DETERMINE IF THE DISTILLED SPIRITS KEPT ON THOSE PREMISES ARE BEING MAINTAINED IN ACCORD WITH STATUTORY REQUIREMENTS, IS NOT VIOLATIVE OF THE FOURTH AMENDMENT

Before turning to an analysis of the bearing of *Camara* v. *Municipal Court,* 387 U.S. 523, and *See* v. *City of Seattle,* 387 U.S. 541, on the validity of the instant statutory scheme, we believe it is important to summarize the unique legal history of the liquor industry. That history shows that the industry has long and consistently been subject to pervasive governmental control and regulation, and that the authority to inspect the premises on which the industry conducts its business has always been deemed an indispensable ingredient for successful regulation and an important means of preventing fraud on the revenue.

#### A. SINCE LONG BEFORE THE ADOPTION OF THE FOURTH AMENDMENT THE LIQUOR INDUSTRY HAS BEEN SUBJECT TO STRICT GOVERNMENTAL INSPECTION OF THE PREMISES ON WHICH IT IS CONDUCTED

1. Regulation of the liquor industry in England can be traced back to the thirteenth-century "assize of bread and ale" which, like a number of similar provisions enacted during the fourteenth and fifteenth centuries, was principally concerned with setting the price of liquor sold for on-premises consumption and

maintaining order in the taverns.[3] The first licensing act was passed in England in 1552 (Act of 5 & 6 Edw. 6, c. 25), and the scope of the licensing system was broadened to include all sellers of spirits by the Licensing Act of 1627 (3 Car. 1, c. 3). The first excise taxes on liquor were levied in 1643, and these revenues were settled on the king in 1660. The legislation of 1660—the precursor of modern-day liquor legislation—provided that commissioners appointed by the king could themselves appoint "gagers" who were to be permitted "at all times, as well by night as by day" to enter on demand brewing houses, distilling houses and any other places where beer or liquor was manufactured in order to measure the amounts being produced. The brewer was forbidden to sell his product if he refused to allow the gager to enter (12 Car. 2, c. 23, § 19).

This right of entry to commercial establishments producing and selling distilled spirits was specifically recognized by William Pitt, Earl of Chatham, during the 1763 debates on a bill to levy an excise tax on "cyder and perry." He opposed the extension of this authority to those who produced cider at home, and it was in this context that he made the plea to protect "the poorest man * * * in his cottage" (see Pet. Br. 13).[4] Presumably to insure that individuals would be

[3] Porritt, *Five Centuries of Liquor Legislation in England*, 10 Pol. Sci. Q. 615 (1895).

[4] An enlightening addition to those remarks is reported in Hansard, *Parliamentary History of England* (1813), vol. 15, column 1307. Speaking of Pitt's argument, Hansard wrote:

"The laws of excise are odious and grievous to the dealer, but intolerable to the private person. The precedent, he con-

able to produce cider at home for their own consumption free from governmental interference, Parliament made general provision for the excise collector to enter only mill houses, storehouses and cellars used to produce and store cider (7 Geo. 3, c. 12, § 10). This legislation provided also that any person who wished to manufacture cider for his own use could pay a yearly fee for each member of his household and would then be exempt from "search and survey" (*id.* at § 14).[5]

A parallel development is found in the American Colonies. Colonial legislatures modeled their first liquor laws for the most part on the English Licensing Act of 1627, *supra* p. 8. Typically these laws required retail dealers to obtain licenses and post bonds and also set the prices at which liquor could be sold for on-premises consumption.[6]

In Massachusetts, which had a particularly comprehensive system of liquor regulation,[7] the right of the constable to enter a retail liquor establishment was recognized by statute as early as 1646. The Act of October 10, 1677, provided for the appointment of

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tended, was particularly dangerous, when men by their birth, education, and profession, very distinct from the trader, became subjected to those laws."

Reporting further on the debate, Hansard wrote (*id.*, at columns 1307–1309): "The grower of hops has often his very bedchamber visited by an exciseman; for the poorer sort of farmers are obliged to dry and weigh their hops in their own houses."

[5] Contrast the Act of 3 Geo. 3, c. 11, regulating the manufacture of bread, which provided for inspection only by warrant.

[6] *Byse, Alcoholic Beverage Control Before Repeal*, 7 Law and Contem. Prob. 544–545 (1940).

[7] See Howie, *Three Hundred Years of the Liquor Problem in Massachusetts*, 18 Mass. L.Q. 75, 93–121 (May, 1933).

"tythingmen," who were charged with the inspection of "houses of entertainment" to enforce the laws against violation of the sabbath. The Act of June 8, 1692, provided that a collector of the excise had the right to enter any "Retailer's House, Cellar, or Warehouse, to Search for such Wares or Liquors, etc., as are not duely Entered nor the Excise paid for the same, and such Wares or Liquors, etc., so found, to Seize and Secure * * *." Significantly, this provision was enacted some thirty years after the writs of assistance legislation of 1662 (Act of 13 & 14 Car. 2, c. 11, § 5). The enactment of this inspection provision despite the colonists' hatred of the unlimited search authority granted by the writs of assistance strongly suggests that the argument of James Otis in *Paxton's* case (see Pet. Br. 16), challenging the legality of the writs, was directed not at inspections of *licensed liquor dealers* but rather at inspections, under the authority of the writs, of the "house, shop, cellar, warehouse or room, or other place" of private individuals (13 & 14 Car. 2, c. 11, § 5).[8]

2. In 1791, the year in which the Fourth Amendment was ratified, Congress imposed an excise tax on distilled spirits imported from abroad and on liquor distilled in the United States (Act of March 3, 1791, 1 Stat. 199). The statute granted broad authority to inspect distilling premises and the premises of the importer. Section 29 thus provided (1 Stat. 206):

That it shall be lawful for the officers of

[8] See generally Wroth and Zobel, eds., *Legal Papers of John Adams* (1965), vol. 2, pp. 106–144.

> inspection of each survey at all times in the daytime, upon request, to enter into all and every the houses, store-houses, ware-houses, buildings and places which shall have been [registered] in manner aforesaid, and by tasting, guaging or otherwise, to take an account of the quantity, kinds and proofs of the said spirits therein contained; and also take samples thereof, paying for the same the usual price.

See, also, Section 26 (1 Stat. 205).[9] A similar right of entry to inspect distilleries was reaffirmed in 1813 (Act of July 24, 1813, Section 5, 3 Stat. 42, 43–44).

It is, of course, true that this early federal legislation did not in terms deal with inspection of the premises of a retail liquor dealer. This may fairly be explained, however, by the fact that the *federal* government was not then exercising general regulatory authority over retail dealers.[10] As we have noted, the 1791 Act did authorize warrantless inspection of the

[9] This 1791 statute also contained a provision authorizing the issuance of a search warrant (Section 32, 1 Stat. 207). However, the search warrant provision applied only where there was "reasonable cause of suspicion" "to be made out to the satisfaction" of a judge or justice of the peace that the distilled spirits had been fraudulently hidden, deposited or concealed "in any place whatsoever, with intent to evade the duties thereby imposed on them." It had no relation to the customary inspection authority utilized to see that the distiller and importer was carrying on his business in accordance with law, on his *business premises*.

[10] While there was some early federal licensing of liquor dealers for revenue purposes, these were temporary measures which, when no longer needed, were repealed. See *License Tax Cases*, 5 Wall. 462, 471–472.

business premises of distillers and importers.[11] There is no reason to assume that the framers of that legislation believed that the Fourth Amendment required a different method of regulating retailers (some of whom were also distillers during this period).

The purpose of statutory regulation of distilleries, including inspection, was, and is, to avoid substantial losses of revenue through fraud. Cf. *United States* v. *Ulrici*, 111 U.S. 38, 40.[12] When Congress found the same danger of significant fraud on the revenue arising in the retail liquor field, it authorized similar war-

[11] In 1868 Congress enacted the first comprehensive regulatory scheme particularly directed at distillers and their premises as well as the warehouses in which large quantities of distilled spirits were kept (Act of July 20, 1868, 15 Stat. 131). This legislation was enacted because of massive frauds on the revenue perpetrated by the "Whiskey Ring". See Bureau of Internal Revenue Service, Monographs of the United States Government, No. 25, pp. 27–28; 5 Wilson, *A History of the American People* 95 (1902).

The 1868 statute granted broad regulatory authority over distillery operations to insure against fraud on the revenue. For example, provision was made to penalize the addition of any substance to distilled spirits before the tax had been paid (Sec. 38, 15 Stat. 141; Rev. Stat. § 3252 (2d ed. 1878)); a storekeeper was to be appointed for each warehouse (Sec. 15, 15 Stat. 130; Rev. Stat. § 3271 (2d ed. 1878); and revenue officers were given access to all parts of a distiller's premises, even to the extent of breaking in where entry was refused (Sec. 32, 15 Stat. 139; Rev. Stat. § 3276 (2d ed. 1878)). This authority to break into distilleries without a warrant exists to this day. See 26 U.S.C. 5203(b).

[12] In fiscal 1968, for example, the federal government collected some $4,287,236,646.00 in taxes on distilled spirits, wine and beer. The tax is now $10.50 per gallon, and at the end of fiscal 1968 there was stored in bonded warehouses liquor having a tax value of more than 11½ billion dollars. See Internal Revenue Service, *Fiscal 1968, Alcoholic and Tobacco Summary Statistics*, 1, 2, 15, 77 (1969).

rantless inspections of the business premises of liquor dealers.[13] In recommending the enactment of 26 U.S.C. 5301(c) (see Appendix, *infra* pp. 37–38), designed to prevent the principal method of fraud at the retail level—the refilling of bottles, the Senate Committee on Finance pointed out in 1958 (S. Rep. 2090, 85th Cong., 2d Sess. 171):

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[13] The first broad federal licensing provision covering retail liquor dealers was Section 79, part five of the Act of June 30, 1864, 13 Stat. 223, 251–252. See *License Tax Cases*, 5 Wall. 462, 469–475, discussing, and upholding the constitutionality of, this provision.

The inspection authority granted under this statute—which is the precursor of the legislative scheme involved in this case—provided in pertinent part (Section 37, 13 Stat. 238) that a revenue agent "shall be authorized to enter, in the daytime, any * * * building, or place where any property, articles, or objects, subject to duty or taxation under the provisions of this act, are * * * kept * * * so far as it may be necessary for the purpose of examining said property, articles, or objects * * *. And every owner of such * * * building, or place, or persons having the agency or superintendence of the same, who shall refuse to admit such officer, to suffer him to examine said property, articles, or objects * * * shall, for every such refusal, forfeit and pay the sum of five hundred dollars: *Provided, however*, That when such premises shall be open at night, such officers may enter while so open in the performance of their official duties."

Section 38 of the Act (13 Stat. 238) imposed a fine or term of imprisonment on any person who obstructed inspection or forcibly attempted to rescue the objects seized by the inspector. See, for later amendment, R.S. 3177 (Rev. Stat. 2d ed. 1878); 26 U.S.C. 3601 (1952 ed.). In 1954, these provisions became the present Sections 7606 and 7342 (see Appendix, *infra* p. 38) with "no material change from existing law." H. Rep. No. 1337, 83d Cong. 2d Sess., pp. A430, A436; S. Rep. No. 1622, 83d Cong. 2d Sess., pp. 609, 617.

372-507—70——3

> The prevention of the reuse of liquor bottles or other authorized containers for the packaging of any distilled spirits, or of the alteration of the original contents of liquor bottles or other authorized containers which have been used for the packaging of distilled spirits, is essential for the protection of the revenue since it is in most cases impossible, once the container has been refilled or the original contents thereof altered by the addition of any substance (whether taxable or nontaxable), to establish whether the tax on the contents of such containers has been lawfully determined.
>
> * * * It is essential to the effective operation of the system of control of distilled spirits for the protection of the revenue that Government officers and the public be able to rely on the integrity of the stamps, marks and brands on liquor bottles or other authorized containers of distilled spirits as credible evidence that the spirits at the time of purchase or sale remain exactly the same as they were at the time of affixture of the stamp in order to prevent the use of stamped authorized containers as an instrument in the aid of fraud.

When it enacted Section 5301(c), Congress also emphasized the need for authority to inspect retail liquor dealers' premises in order to control this threat to the revenue, by conferring such authority in Section 5146 (b) of the Act (see Appendix, *infra,* p. 37), even though similar inspection authority already existed under 26 U.S.C. 7606 (Appendix, *infra,* p. 38). The new provision, the Senate Committee explained, was intended "to reaffirm and clarify the authority of the

Secretary or his delegate with regard to the entry of wholesale and retail dealer premises for purposes of inspection" (S. Rep. No. 2090, 85th Cong. 2d Sess. 134).

3. The historical and legislative material thus shows that from the earliest times in England [14] and in the colonies the business premises of distillers, importers and liquor dealers were subject to inspection without a warrant; that after the Republic was formed such broad authority to inspect premises of liquor dealers was continued in the States; that the earliest federal legislation granted similar authority to inspect the premises of liquor distillers and importers; and that when the federal government later undertook to regulate the operations of retail liquor dealers, Congress specifically authorized similar inspection of their business premises.

Indeed, the validity of this nonwarrant authority seems to have been implicitly recognized in this Court's opinion *Boyd* v. *United States,* 116 U.S. 616 (1886), relied on by petitioner as descriptive of the reach of the Fourth Amendment (Pet. Br. 17). The question in that case was whether a person's private papers were subject to compulsory discovery in connection with a proceeding to forfeit his property. Mr.

[14] Great Britain has retained an extremely broad power of warrantless inspection. The Licensing Act of 1953, 1 & 2 Eliz. 2, c. 46, § 131(1), provides: "A constable may at any time enter licensed premises, or premises for which or any part of which a special hours certificate is in force * * * for the purpose of preventing or detecting the commission of any offense against this act." See, also, Customs and Excise Act of 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 44, § 131(5).

Justice Bradley, writing for the Court, found no "long usage, or any contemporary construction of the Constitution, which would justify" the Act under which production of such papers was sought to be compelled (116 U.S. at 622). In so ruling, however, the Court specifically affirmed the governmental right to reach articles on which excise taxes were due—*i.e.*, the very right at issue here. As the Court pertinently stated in *Boyd* (116 U.S. at 623–624):

> * * * [T]he seizure of goods forfeited for a breach of the revenues laws, or concealed to avoid the duties payable on them, has been authorized by * * * our own revenue acts from the commencement of the government. [Act of July 31, 1789, 1 Stat. 29, 43.] As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. * * *
>
> * * * [I]n the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment * * *.

In sum, it is fair to conclude that, at least where unsupervised liquor operations—whether by distillers, importers, rectifiers or retail dealers—have presented a real danger of defrauding the revenue, Congress has consistently authorized inspection of the business premises involved without evincing any belief that such inspections would be subject to the warrant provisions of the Fourth Amendment. This congressional judgment should be upheld by this Court.

B. THE DECISIONS IN *CAMARA* AND *SEE* DO NOT REQUIRE INVALIDATION OF CONGRESS' AUTHORIZATION OF WARRANTLESS INSPECTION OF THE PREMISES OF LIQUOR DEALERS

In addition to its historic and legislative credentials, the inspection authority at issue here is narrow and precise. It relates only to dealers in liquor (26 U.S.C. 5121(a), 5122(a), Appendix, *infra* p. 37) and provides for entry of their business premises (including places of storage) during business hours for the purpose, insofar as here pertinent, of examining "any distilled spirits, wines, or beer kept or stored by such dealer on such premises" (26 U.S.C. 5146(b), Appendix *infra* p. 37). The ultimate aim of the inspection is to assure compliance with the dealer's statutory obligation not to refill or otherwise alter the contents of stamped liquor bottles, and thus to prevent fraud on the revenue. The statutory scheme, therefore, serves an important governmental interest in a direct and circumscribed way.[15] There are substantial reasons, in our

[15] As noted (see *supra* p. 12, n. 12) in 1968, the federal government collected some $4,287,236,646.00 in taxes on distilled spirits, wine and beer. In that same year, there were 277,909 licensed retail liquor dealers. See Internal Revenue Service, *Fiscal 1968 Alcohol and Tobacco Summary Statistics* (1969), p. 2.

judgment, for not engrafting on this statutory scheme the warrant requirements announced in *Camara* and *See*.

1. In *Camara*, this Court held that the Fourth Amendment bars prosecution of one who has refused to allow a warrantless code-enforcement inspection of his personal residence. The companion *See* decision extended this rule to similar inspections of commercial structures not used as residences.

Of critical concern to the Court in *Camara* and *See* was the danger that the broad inspection authority involved in those cases gave too much discretion to the officer in the field and too little protection to individuals, who might have only minimal awareness of their rights.[16] The specific areas of concern noted by this Court were whether the occupant would know if enforcement of the code required inspection of his house, whether he would know the limits of the inspector's powers, and whether he would know if the inspector was acting under proper authorization. As

[16] The provision involved in *Camara* (387 U.S. at 526), Section 503 of the San Francisco City Housing Code, gave to "employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, * * * upon presentation of proper credentials, * * * the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

The provision involved in *See* (387 U.S. at 541), Section 8.01.050 of the Seattle Fire Code, provided that, "It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, of any violations of the provisions of this Title, and of any other ordinance concerning fire hazards."

the majority opinion in *Camara* put in (387 U.S. at 532–533):

> * * * Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. These are questions which may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area. Yet, only by refusing entry and risking a criminal conviction [11] can the occupant at present challenge the inspector's decision to search. And even if the occupant possesses sufficient fortitude to take this risk * * * he may never learn any more about the reason for the inspection than that the law generally allows housing inspectors to gain entry. The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search. * * * We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may

[11] In *Camara*, the criminal penalty for refusal to permit inspection was a fine not exceeding $500 and/or six months imprisonment (387 U.S. at 527, n. 2). In *See* the penalty was a fine not to exceed $300 and/or imprisonment for 90 days (387 U.S. at 542, n. 1).

> only be invoked at the risk of a criminal penalty.

A similar concern was expressed in *See,* the Court noting that the "businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property" (387 U.S. at 543).

The second area of inquiry deemed significant in *Camara* was whether, despite the intrusion on privacy, the "public interest" required "warrantless administrative searches" (*Camara,* 387 U.S. at 533). After noting that it "has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement" (*ibid.*), the Court in *Camara* found that a search warrant procedure would not be "likely to frustrate the governmental purpose behind the search" (*ibid.*). In *See,* the Court recognized that entry upon commercial premises was a common technique employed by administrative agencies, and found "strong support" for a warrant procedure in an analogy to administrative subpoenas as an established and workable investigative tool. It concluded that "warrants are a necessary and a tolerable limitation on the right to enter upon and inspect commercial premises" (387 U.S. at 543–544; see, also, *id.* at 546).

Turning to the question of how the warrant procedure was to be utilized, the Court in *Camara* stated that "routine periodic inspections of all structures" (387 U.S. at 535–536) are reasonable searches within the meaning of the Fourth Amendment and concluded

that " 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling" (387 U.S. at 538). In *See*, the Court, as aforementioned (*supra* p. 20), focused on the elements which justified the issuance of administrative subpoenas in indicating the nature of the showing that had to be made to justify a search of business or commercial premises. Presumably, the magistrate would assure that the warrant would "be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome" (387 U.S. at 544). There was also the suggestion that the businessman could seek judicial review of the propriety of the inspection "prior to suffering penalties for refusing" to permit it. (387 U.S. at 545). The Court further pointed out that it was not deciding whether warrants could be obtained only after access to business premises had been refused, "since surprise may often be a crucial aspect of routine inspections of business establishments" and "the reasonableness of warrants issued in advance of inspection will necessarily vary with the nature of the regulation involved and may differ from standards applicable to private homes" (387 U.S. at 545, n. 6).[18]

[18] In *Camara*, the Court said, with regard to residences, that "it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry" (387 U.S. at 539–540).

2. When applied to the problem at issue here, the three considerations emphasized in the *Camara* and *See* opinions—the demands of privacy, the public need for the warrantless searches, and the standards to be employed in issuing warrants—support, in our judgment, the liquor inspection procedures Congress has authorized.

*a.* In contrast to the typical homeowner, or even the typical businessman, who might be unfamiliar with municipal housing and fire codes and might therefore unwillingly permit unauthorized entry of an inspector rather than risk criminal prosecution, the retail liquor dealer is in a business which is pervasively regulated by State and federal law, and he must be familiar with these regulatory requirements in order to conduct even the most trivial aspect of his daily business affairs. He is not asked to apprise himself of a broad range of detailed safety requirements only remotely or tangentially related to his business; he is required only to know what restrictions have been placed on his dealings in one product—a product which by the required stamp itself bears the indicium of the federal interest. When revenue agents present their identification at his business premises during business hours and request access to an area expressly made available to them by statute to examine his distilled spirits, the retail liquor dealer is in no position to claim that he is uncertain as to the nature or limits of their authority. Nor can he claim that he is unaware of the reason for inspection, since he is specifically forbidden by 26 U.S.C. 5301(c) (see Appendix, *infra* pp. 37–38) to alter the contents of any bottle of distilled spirits, and he must

be taken to know that the purpose of that prohibition is the protection of the federal tax revenues.[19] In these circumstances, a retail dealer in liquor can hardly assert—as petitioner does here—that he has a reasonable expectation of freedom from government inspection without a warrant of the storage space where he keeps his bottles of liquor. Compare *Mancusi* v. *DeForte,* 392 U.S. 364, 369; *Katz* v. *United States,* 389 U.S. 347, 351.[20]

As noted, we recognize that the Court in *See* relied in substantial measure on the common use of administrative subpoenas in concluding "that warrants are a necessary and a tolerable limitation on the right to enter upon and inspect commercial premises" (387 U.S. at 544). But the Court there was referring to proceedings under statutory schemes which had no bearing on the examination of taxable articles (see 387 U.S. at 544, n. 4 & 5). The distinction drawn by Mr. Justice Bradley in *Boyd* (see *supra,* p. 16) between the right of the government to reach books and records and its right to reach taxable articles simi-

[19] We are advised by the Internal Revenue Service that advice to this effect is contained in written material periodically distributed to retail liquor dealers.

[20] An alternative articulation of this rationale suggested by the court of appeals is that when one enters a highly regulated business, such as that of a dealer in liquor, he in effect "submits himself to statutory authority to the extent of permitting warrantless inspection of alcoholic beverages on his business premises" (A. 54a, 410 F. 2d at 203). See, *e.g.*, *Zap* v. *United States,* 328 U.S. 624, vacated on other grounds, 330 U.S. 800; *Davis* v. *United States,* 328 U.S. 582; *Peeples* v. *United States,* 341 F. 2d 60 (C.A. 5), certiorari denied, 380 U.S. 988; *Ray* v. *United States,* 374 F. 2d 638 (C.A. 5), certiorari denied, 389 U.S. 833.

larly suggests that the subpoena analogy is inapplicable here. Cf. *Peeples* v. *United States,* 341 F. 2d 60, 63–64 (C.A. 5), certiorari denied, 380 U.S. 988.

Moreover, as the court below pointed out (A. 50a-51a; 410 F. 2d at 201–202), in contrast to the danger noted in *Camara* that the subject of the inspection may have no way of knowing the nature and limits of the inspector's authority (387 U.S. at 532), there is only the remotest danger that the Internal Revenue inspector would use his authority to examine distilled spirits as a guise for conducting general exploratory searches. His sole authority under the present statutory scheme is to inspect the premises of the liquor dealer during business hours in connection with the product of his business. An authorization of such limited scope and purpose does not have the potential for misuse which would require the intervention of a magistrate before the fact in order to prevent abuse.

In short, the magistrate asked to issue a warrant authorizing the inspection of a retail liquor dealer's premises could do no more than is presently done by statute. In the vast majority of cases, he could be presented with no information on which to base a more reasoned judgment than that exercised by the agents themselves, and he would reasonably limit the scope of the inspection to those areas and those times already specified in Sections 5146(b) and 7606. Given the nature of the persons whose businesses are subject to inspection, their involvement in a complex system of regulation, and the narrow scope of the

authorizing statute, we submit that, on balance, the competing ends of the privacy of the individual dealer and the effective protection of the revenue will best be served by testing the validity of any particular inspection after the fact rather than by requiring the prior approval of a magistrate.[21] As the court below trenchantly summarized the matter (A. 52a; 410 F. 2d at 202):

> * * * Here the area eligible for inspection is clearly and narrowly defined; the purpose is relevant; the scope is limited; and all of these aspects are well known to the operator of the premises being inspected. Nothing of consequence therefore would be achieved through individualized review by a magistrate. In the proper exercise of his discretion, the magistrate would be compelled to issue a warrant as a matter of course, duplicating the limited authority already granted by statute. In short, the statute here under consideration is the equivalent of a warrant.

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[21] Thus, petitioner's reliance (Pet. Br. 21) upon *Finn's Liquor Shop, Inc.* v. *State Liquor Authority*, 24 N.Y. 2d 647, 249 N.E. 2d 440, is misplaced. In that case, inspectors of the State Liquor Authority entered Finn's retail liquor shop and searched a coat hanging in the rear of the store. Slips found therein showing that, in violation of state law, sales had been made on credit were thereafter introduced in an administrative proceeding resulting in a suspension of Finn's license. As the New York Court of Appeals pointed out, the search of the coat was not within the statutory grant of inspection authority (249 N.E. 2d at 444–445). Moreover, in discussing the reach of *See* the court observed that the opinion in that case had indicated "that the Constitution might not inhibit certain narrowly defined inspection procedures," citing the instant case as an example (*id.* at 445).

*b.* The second pertinent area of inquiry—"whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search" (*Camara,* 387 U.S. at 533)—likewise suggests that the present statutory scheme is reasonable and hence permissible under the Fourth Amendment.

As we have emphasized (see *supra,* pp. 12–14), these statutes are designed to avoid the loss of sizable amounts of revenue through fraud. The evidence of that fraud perpetrated by a liquor dealer who has refilled liquor bottles can be removed completely and with dispatch. If the suggestion of *Camara* is followed, that "warrants should normally be sought only after entry is refused" (387 U.S. at 539) the result, as the court below pointed out, would be that "the cat would be let out of the bag," the dealer would destroy the evidence of his fraud before a warrant could be obtained "and the essential government purpose would be frustrated" (A. 53a; 410 F. 2d at 203). Although such a result may be an acceptable resolution of the problem in the case of a homeowner who eliminates a fire or safety hazard, it would accomplish nothing here except frustration of the statutory purpose.

If, on the other hand, as is suggested in *See,* warrants are to be obtained in advance of inspection because here the element of "surprise" is "a crucial aspect" (387 U.S. at 545, n. 6), then the entire inspection procedure employed by the Internal Revenue Service with regard to retail liquor dealers would have to be radically remodeled. In fiscal 1965, the latest year for which accurate figures are available, 13,366

inspections of retail liquor dealers were conducted throughout the nation,[22] and this figure represents only a minor percentage of the total number of licensed retail liquor dealers. (There were some 277,909 in 1968.) Very few of these dealers refuse consent to an inspection.[23] Obviously, the blanket use of a warrant procedure would be wasteful and would tend to antagonize the law-abiding dealers. Moreover, there would be the risk that dealers might be "tipped off" when warrants are obtained and destroy the evidence before the agents arrive on the scene.[24]

Since "the controlling standard [is] reasonableness" (*Camara*, 387 U.S. at 539),[25] we submit that the sub-

[22] In fiscal 1963 there were 24,154 inspections, and in fiscal 1964 there were 23,883.

[23] The estimate of the refusal rate in the North Atlantic region is 1 out of 75; the area supervisors of the Mid Atlantic region could not recall any refusals or objections to conducting inspections.

*Hammond Milling Company et al.* v. *United States*, presently pending on petition for a writ of certiorari, No. 648, this Term, involves the question whether inspectors of the Food and Drug Administration inspected a food processing plant with the consent of the owner, and does not put in issue whether such a search could be made without consent in the absence of a search warrant. We are advised that when Food and Drug Administration inspectors are denied entry, they seek to obtain a warrant before returning to the premises sought to be inspected.

[24] As the court below pointed out, an "advance tipoff" was frequent during the Prohibition era (A. 53a).

[25] The Court accordingly pointed out in *Camara* (387 U.S. at 539) that "nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations. See *North American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306 (seizure of unwholesome food); *Jacobson* v. *Massachusetts*, 197 U.S. 11 (compulsory smallpox vaccination); *Compagnie Fran-*

stantial disadvantages of using a warrant procedure in this field justify, in light of the minimal additional safeguard of any right of privacy that warrants would provide (see *supra*, pp. 22–25), Congress' authorization of limited inspections of retail liquor premises without warrants.

*c.* The third factor considered in *Camara* and *See* was the standards to be employed in determining whether to issue warrants. Those suggested in *Camara* would not meet the need here. Passage of time and the condition of the general area (see *Camara*, 387 U.S. at 535–538) are considerations basically unrelated to the need for inspection of a liquor dealer's premises. Nor are there apt to be any other outward signs which would reveal such a need.

The fact of the matter is that the inspection criteria employed in this field are, of necessity, somewhat elastic in nature. They vary from region to region. We are advised that at the present time in the North Atlantic and Mid-Atlantic regions inspections of dealers are "based on some reason to believe or suspect"—less than probable cause (cf. *Terry* v. *Ohio*, 392 U.S. 1)—that a refill violation is occurring. We are further advised, however, that this is not a fixed or invariable policy, but one dependent on manpower availability, the peculiar requirements of local regions, the number of violations discovered and other factors. In addition,

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*caise* v. *Board of Health*, 186 U.S. 380 (health quarantine); *Kroplin* v. *Traux*, 119 Ohio St. 610, 165 N.E. 498 (summary destruction of tubercular cattle)."

greater emphasis is placed upon dealers who engage in the sale of liquor for on-premises consumption. But this also is subject to changing circumstances and needs. This flexible approach is peculiarly appropriate to the specific purpose of these inspections and the problems involved in detecting fraud on the revenue in this field—but it is not an approach which seems conducive to meaningful decision making by judicial officers in the context of warrant proceedings.

Thus, this factor, like those discussed heretofore, supports the congressional choice of a limited liquor inspection system which does not require the use of warrants. Since, as *See* pointed out, the reasonableness of regulatory inspection schemes is to be decided "on a case-by-case basis" (387 U.S. at 546), the decision here should be to uphold this congressional judgment as consonant with the requirements of the Fourth Amendment.

## II

### THE INSPECTION HERE WAS NOT VIOLATIVE OF THE STATUTORY SCHEME NOR WAS THE SEARCH RENDERED UNREASONABLE BY THE BREAKING OF THE STOREROOM LOCK

We have argued in the foregoing portion of this Brief that the statutory inspection scheme at issue in this case comports with historic practice and is not inconsistent with the rulings in *Camara* and *See*. The question remains whether that authority was validly implemented in this case in light of the forced entry into the storeroom. It is our position that the force

used here was within statutory authority and did not violate the Fourth Amendment.[26]

A. It is arguable that, because 26 U.S.C. 7342 (see Appendix, *infra* p. 38) provides for a forfeiture of $500 each time the owner of premises refuses entry to an Internal Revenue inspector, nonconsensual entries, such as that into the storeroom in this case, are not authorized. The argument would be that statutory forfeiture and, in appropriate cases, criminal prosecution[27] are the exclusive remedies for refusals by liquor dealers to permit inspections and hence that any use of force by the agents to override such a refusal is impermissible.

We submit that such an interpretation would frustrate the core purpose of the statutory scheme. Congress sought to prevent frauds on the revenue by authorizing revenue agents, so far as relevant here, to inspect liquor bottles to determine if they had been refilled or their contents in any way altered. It granted this authority because this was the only way to determine if liquor dealers were complying with the bottling law. If they were not—if, for example, some dealers were using distilled spirits obtained from the illicit traffic to refill their bottles—

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[26] The overall validity of the statutory scheme is not, of course, dependent on the Court's agreement with our contention that the use of force in this case was valid. We are advised by the Internal Revenue Service that the present case is the only one in which, to their knowledge, force has been used to gain entry to the premises of a retail liquor dealer.

[27] 26 U.S.C. 7212(a) makes it a felony punishable by a fine and/or a maximum of 3 years imprisonment, *inter alia*, to use "force or threats of force" to impede any officer or employee of the United States in carrying out his statutory duties.

they could defraud the revenue of very large sums of money. In these circumstances, government supervision only of authorized distillers would not prevent the fraud. It is clear that Congress extended inspection authority to the premises of retail dealers in order to eliminate such gaps in the statutory enforcement scheme. Nor could Congress, in its concern to prevent fraud on the revenue, have intended to give the liquor dealer the option to substitute the payment of a civil fine[28] for making his stock available for inspection.

There are, we submit, more reasonable interpretations which would better serve the overriding statutory objective. One possibility is that Congress was in effect saying to the liquor dealer: "any attempt on your part to prevent inspection will be met by the use of reasonable force to accomplish the statutory objective, and use of force on your part to deny an officer admittance may subject you to a $500 civil fine or criminal prosecution." So interpreted, the threat of forfeiture or criminal prosecution would be an inducement to permit inspection. At the same time, this interpretation would be in keeping with the common law rule that forcible entry, with its concomitant danger to person and property, should be used by inspecting agents only as a last resort. Another possible interpretation is that the congressional purpose was to afford alternative remedies to

[28] 26 U.S.C. 7342 provides for the $500 forfeiture where there is refusal to comply with a demand for inspection under 26 U.S.C. 7606. Another provision of the Code, 26 U.S.C. 7401, provides authority to institute a civil action to collect a forfeiture. See, also, 26 U.S.C. 7323.

the enforcement officer. On this analysis, the inspector could make a reasoned judgment whether the circumstances call for an entry despite refusal, or whether the statutory alternatives would provide a sufficient remedy. Of course, any alleged abuse of such discretion by the use of excessive force in gaining entry would be subject to judicial remedy by way of a motion to suppress.

There may be other interpretations that also are consistent with the statutory purpose, but there is no need in this case for the Court to choose among them. We stress only that it would frustrate the statutory objective to hold that reasonable use of force, such as occurred here, is not authorized where there has been an affirmative refusal to comply with a request for inspection. In *See,* this Court recognized that physical force might be used "within the framework of a warrant procedure" to gain entry to commercial premises (387 U.S. at 545). Since, in accord with the opinion below, we are of the view that the statutory authorization at issue here is basically the equivalent of a warrant, we believe that the use of minimal force—as here—to gain entry to the storeroom of a retail liquor dealer during business hours is consistent with *See.*

B. The reasonable use of force in gaining entry to premises does not *per se* violate the Fourth Amendment. *Miller* v. *United States,* 357 U.S. 301; *Sabbath* v. *United States,* 391 U.S. 585. As the Court noted in

*Miller, supra* at 313, Congress has, in 18 U.S.C. 3109,[29] codified "a tradition embedded in Anglo-American law"; accordingly each use of force must be tested against the standards underlying that statute.

It should first be noted that, by its terms, Section 3109 deals only with the right to use force in entering a house. The common law rule was directed solely at that issue, see *Semayne's Case,* 5 Coke 91, 77 Eng. Rep. 194 (1603), and Congress adopted it essentially without change.[30] Neither William Pitt, quoted in *Miller, supra* at 307, nor Congress was dealing with the right of the tax collector to enter the liquor dealer's premises in order to examine his liquor bottles.

In any event, the requirements of Section 3109 were clearly met in the instant case. The agents announced their identity and purpose, after gaining access to the general premises which were open to the public. They awaited the arrival of the person alleged to have the authority to open the storeroom, repeated their request and stated that they were authorized to inspect the storeroom without a warrant. Only when they were again refused admittance did they break the lock. The agents were not seeking to invade a residential

---

[29] "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

[30] This limitation of Section 3109 to the search of houses has been noted in *Fields* v. *United States,* 355 F. 2d 543 (C.A. 5), petition for certiorari dismissed, 384 U.S. 935; and *United States* v. *Hassell,* 336 F. 2d 684 (C.A. 6).

area; and the person in control of the storeroom had refused to open it and thus protect his property against whatever damage might ensue. In these circumstances, the limited amount of force employed was necessary in order for the agents to effectuate their statutory duty. As the court below put it, "[t]here would be no point in holding warrantless searches by alcohol tax inspectors to be reasonable if the owner of the premises could render them unreasonable by withholding his consent and compelling the agent to use the minimum amount of force necessary to accomplish his objective" (App. 56a; 410 F. 2d at 204).

This is not to say that agents may invade those parts of a dealer's premises which are, in fact, private [31] or may search the dealer's clothing.[32] Rather, our submission is that agents, who are restricted to making their inspections during hours when the dealer's business is open to the public, may use a reasonable amount of force, when necessary, to penetrate internal barriers standing between them and the bottles they are specifically authorized to examine.

In sum, we submit that the reasonableness of each search conducted pursuant to 26 U.S.C. 5146(b) and 7606 must be tested on its facts. Its scope and manner of execution may be readily challenged, as was the inspection here, by a motion to suppress and return, and where the agents have gone beyond the bounds of their authority either in the nature of the places

[31] *United States* v. *Frisch*, 140 F. 2d 660 (C.A. 5).

[32] *Finn's Liquor Shop, Inc.* v. *State Liquor Authority*, 24 N.Y. 2d 647, 249 N.E. 2d 440 (see *supra*, p. 25, n. 21).

searched or in the amount and type of force used, an effective sanction is available. Since no showing of abuse was made here, there is no ground for reversal of the judgment below.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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DECEMBER 1969.

## APPENDIX

26 U.S.C. 5121(a) provides:

> Retail dealers in liquors.—Every retail dealer in liquor shall pay a special tax of $54 a year. * * *

26 U.S.C. 5122(a) provides:

> Retail dealers in liquors.—When used in this chapter, the term "retail dealer in liquors" means any dealer, other than a retail dealer in beer or a limited retail dealer, who sells, or offers for sale, any distilled spirits, wines, or beer, to any person other than a dealer.

26 U.S.C. 5146(b) provides:

> Entry of premises for inspection.—The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises.

26 U.S.C. 5301(c) provides:

> Refilling of liquor bottles.—No person who sells, or offers for sale, distilled spirits, or agent or employee of such person shall—
>
> (1) place in any liquor bottle any distilled spirits whatsoever other than those contained in such bottle at the time of stamping under the provisions of this chapter; or
>
> (2) possess any liquor bottle in which any distilled spirits have been placed in violation of the provisions of paragraph (1); or

(3) by the addition of any substance whatsoever to any liquor bottle, in any manner alter or increase any portion of the original contents contained in such bottle at the time of stamping under the provisions of this chapter; or

(4) possess any liquor bottle, any portion of the contents of which has been altered or increased in violation of paragraph (3); * * *.

26 U.S.C. 7606 provides in pertinent part:

Entry of premises for examination of taxable objects.

(a) Entry during day.

The Secretary or his delegate may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects.

(b) Entry at night.

When such premises are open at night, the Secretary or his delegate may enter them while so open, in the performance of his official duties.

26 U.S.C. 7342 provides:

Any owner of any building or place, or person having the agency or superintendence of the same, who refuses to admit any officer or employee of the Treasury Department acting under the authority of Section 7606 (relating to entry of premises for examination of taxable articles) or refuses to permit him to examine such article or articles, shall, for every such refusal, forfeit $500.

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# TABLE OF CONTENTS


PAGE

I.—There cannot be a valid waiver *in futuro* of Fourth Amendment rights ..... 1

II.—The fact that inspection provisions relating to liquor dealers have a long history does not establish an exception to the Fourth Amendment 4

III.—The government's own brief demonstrates that the Fourth Amendment's warrant procedure will not unduly burden the Internal Revenue Service ..... 4

IV.—What the government is really seeking to do is to convert inspection provisions into unconstitutional general warrants to search for evidence, to be executed by force, if necessary .... 7

V.—In any event, as a matter of statutory construction, the inspection provisions involved in the instant case do not contemplate the use of force ..... 14

CONCLUSION ..... 15


## TABLE OF AUTHORITIES

*Cases:*


Camara v. Municipal Court, 387 U.S. 523 (1969) ..... 6, 11

Frank v. Maryland, 359 U.S. 360 (1959) ..... 14

Gouled v. United States, 255 U.S. 298 (1921) ..... 7

James v. Goldberg, 303 F.Supp. 395 (S.D.N.Y. 1969), *jurisdictional statement filed sub nom.*, Wyman v. James, 38 U.S.L. Week 3237 (No. 977, Oct. Term, 1969) ..... 1–2

PAGE

Johnson v. United States, 333 U.S. 10 (1947) ..... 7,8

McDonald v. United States, 335 U.S. 451 (1948) ..... 7,8

See v. City of Seattle, 387 U.S. 541 (1967) ..... 7

United States v. Lefkowitz, 285 U.S. 452 (1931) ..... 7,9

Warden v. Hayden, 387 U.S. 294 (1967) ..... 7

Zap v. United States, 328 U.S. 624 (1946), *vacated on other grounds,* 330 U.S. 800 (1947) ..... 14

***United States Constitution:***

Fourth Amendment ..... 4,5

***Statutory and Other Provisions Involved:***

18 U.S.C. §3109 ..... 13,14
26 U.S.C. §5146(b) ..... 14
26 U.S.C. §5203(b) ..... 10,14
26 U.S.C. §7212(a) ..... 14
26 U.S.C. §7302 ..... 15
26 U.S.C. §7342 ..... 14
26 U.S.C. §7606 ..... 14
26 U.S.C. §7606(a) ..... 14
Rule 41(b) of the Federal Rules of Criminal Procedure ..... 10

IN THE

# Supreme Court of the United States

October Term, 1969

No. 108

THE COLONNADE CATERING CORP., *Petitioner,*

*against*

UNITED STATES OF AMERICA, *Respondent.*

## PETITIONER'S REPLY BRIEF

### I

**There cannot be a valid waiver *in futuro* of Fourth Amendment rights.**

Although reduced to the status of an alternative articulation in a footnote, the government, quoting the Second Circuit below, still contends that liquor dealers waive *in futuro* their Fourth Amendment rights (Brief, p. 23, n. 20). The contention is without merit.

In a recent case, *James* v. *Goldberg,* 303 F.Supp. 395 (S.D.N.Y. 1969), *jurisdictional statement filed sub nom.*

*Wyman* v. *James*, 38 U.S.L. Week 3237 (No. 977, Oct. Term, 1969), a federal three-judge court for the Southern District of New York labored its way around the Second Circuit's ruling in the instant case; and held that state officials could not condition receipt of state Aid to Families With Dependent Children (AFDC) on the recipients' agreeing to warrantless home visits. The court in one paragraph of its opinion reasoned:

> Even if we assume that AFDC grants are a privilege or governmental gratuity,[11] the power of government to decline to extend these benefits to its citizens "does not embrace the supposedly 'lesser' power to condition the receipt of those benefits upon any and all terms." Parris v. Civil Service Comm'n of the County of Alameda, 66 Cal. 2d 260, 57 Cal. Rptr. 623, 630, 425 P. 2d 223 (1967). For to deny plaintiff even a gratuitous benefit because of the exercise of a constitutional right effectively impedes the exercise of that right. Thompson v. Shapiro, 270 F.Supp. 331, 336 (D. Conn. 1967), aff'd, 389 U. S. 1032, 88 S.Ct. 784, 19 L.Ed. 2d 820 (1969). While this Court clearly recognizes the necessity of and desirability for procedures which will enable the Department of Social Services to administer its programs with a minimum of loss due to fraudulent claims or the unwise allocation of these grants by deserving but inexperienced recipients to the end that the limited funds provided by government may best be used to relieve the needs of those persons in actual want, see 81 C.J.C. Social Security & Public Welfare §9, n. 70 (1953), when the conditions annexed to the enjoyment of these benefits require a waiver of rights secured by the Constitution, the governmental entity seeking to impose those conditions must show a compelling state interest therefor. No showing merely of a rational relationship to some

valid governmental policy will suffice. Sherbert v. Verner, 374 U. S. 398, 406, 83 S.Ct. 1790, 10 L.Ed. 2d 965 (1963); Speiser v. Randall, 357 U. S. 513, 78 S.Ct. 1332, 2 L.Ed. 2d 1460 (1958); Wieman v. Updegraff, 344 U. S. 183, 191-192, 73 S.Ct. 215, 97 L.Ed. 216 (1952); American Communications Ass'n v. Douds, 339 U. S. 382, 390, 70 S.Ct. 674, 94 L.Ed. 925 (1950); Thomas v. Collins, 323 U. S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430 (1945). Nor will it suffice for the state to show merely that the public interest justifies the type of search in question. For the issue is not whether the public interest justifies home visits, but whether the initial or continued receipt of AFDC benefits can in consonance with the Constitution be made dependent upon the applicants' or recipients' submission to *warrantless* searches.[12]

In footnote 12 the three-judge court put this pertinent question:

> An analogy may be drawn between the listing of dependents on an income tax return and the listing of dependent children on applications for public assistance. Yet, could it be successfully argued that the right to obtain an income tax exemption for such dependents may lawfully be made dependent upon the taxpayer's consent to the warrantless entry into his home of Internal Revenue Service Agents?

## II

**The fact that inspection provisions relating to liquor dealers have a long history does not establish an exception to the Fourth Amendment.**

The framers of the Fourth Amendment provided for two things. To begin with, they provided: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." There is no exception. Then they added: "and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Again there is no exception. If the framers of the Fourth Amendment had intended an exception for the premises of liquor dealers, they would have said so.

## III

**The government's own brief demonstrates that the Fourth Amendment's warrant procedure will not unduly burden the Internal Revenue Service.**

The government in its brief (p. 26) expressed the fear that a warrant procedure would frustrate an essential governmental purpose in that the evidence would be destroyed. But the government's own brief presents facts which belie this fear. In the instant case the government had a full week in which to get a warrant. As government counsel stated in argument before District Judge Weinstein, "one of these very agents was at a Bar Mitzvah there the weekend before, and he saw what looked to him

to have been refilled bottles, and so he went and he put in a routine complaint, which was being acted on this following Saturday" (A. 31a-32a).

Moreover, according to the government's brief (pp. 26-27) the government conducts thousands of inspections of retail liquor dealers throughout the nation without any resistance from the liquor dealers. For the following fiscal years there were the following numbers of inspections:

| *Year* | *Inspections* |
|---|---|
| 1963 | 24,154 |
| 1964 | 23,883 |
| 1965 | 13,366 |

Further, to quote the government's brief: "Very few of these dealers refused consent to an inspection.[23]" In footnote 23 the government added: "The estimate of the refusal rate in the North Atlantic region is 1 out of 75; the area supervisors of the Mid Atlantic region could not recall any refusals or objections to conducting inspections." What happened in the 1 refusal out of 75 requests in the North Atlantic region the government's brief does not disclose. However, the government's brief indicates that the instant case is the only one in which force was used: "We are advised by the Internal Revenue Service that the present case is the only one in which, to their knowledge, force has been used to gain entry to the premises of a retail liquor dealer" (Brief, p. 30, n. 26). Thus to extend the Fourth Amendment to the Internal Revenue Service will not burden the Service. And surely to have required an agent of the Service to obtain a warrant in the full week in which he had to do so would not have been burdensome.

Government counsel are opposed to the warrant procedure because they have been advised that inspections of liquor dealers in the North Atlantic and Mid-Atlantic regions are "based on some reason to believe or suspect", less than probable cause, that a refill violation is occurring (Brief, p. 28). But the answer to this point is that the standard of reasonableness for probable cause will vary with the type of case involved. As the Court pointed out in *Camara* v. *Municipal Court*, 387 U. S. 523, 538-39 (1967):

> Having concluded that the area inspection is a "reasonable" search of private property within the meaning of the Fourth Amendment, it is obvious that "probable cause" to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (*e.g.*, a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling. It has been suggested that so to vary the probable cause test from the standard applied in criminal cases would be to authorize a "synthetic search warrant" and thereby to lessen the overall protections of the Fourth Amendment. *Frank* v. *Maryland*, 359 U. S., at 373. But we do not agree. The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. Cf. *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186. Such an approach nei-

ther endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area. It merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy. See *Eaton* v. *Price*, 364 U. S., at 273-274 (opinion of Mr. Justice BRENNAN).

## IV

**What the government is really seeking to do is to convert inspection provisions into unconstitutional general warrants to search for evidence, to be executed by force, if necessary.**

The government near the end of its brief discloses its real purpose, namely, to convert inspection provisions into unconstitutional general warrants to search for evidence: "Since, in accord with the opinion below, we are of the view that the statutory authorization at issue here is basically the equivalent of a warrant, we believe that the use of minimal force—as here—to gain entry to the storeroom of a retail liquor dealer during business hours is consistent with *See*" (Brief, p. 32). But *See* v. *City of Seattle*, 387 U. S. 541 (1967) leads to no such result.

Although *Warden* v. *Hayden*, 387 U. S. 294 (1967), overruled *Gouled* v. *United States*, 255 U. S. 298 (1921), and sanctioned a reasonable search for evidence incident to a lawful arrest, it did not overrule *McDonald* v. *United States*, 335 U. S. 451 (1948), or *Johnson* v. *United States*, 333 U. S. 10 (1947), or *United States* v. *Lefkowitz*, 285 U. S. 452 (1931).

The Court in *Hayden* did not overrule *McDonald* v. *United States,* 335 U. S. 451 (1948), where the Court invalidated a search without a warrant, saying:

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative. 335 U. S. at 455-56.

The Court in *Hayden* did not overrule *Johnson* v. *United States,* 333 U. S. 10 (1948), involving a hotel room, where the Court held and said:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any as-

sumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent. 333 U. S. at 13-14.

The Court in *Hayden* did not overrule *United States* v. *Lefkowitz*, 285 U. S. 452 (1932), where the Court stated:

> The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy. *Byars* v. *United States*, 273 U. S. 28, 32. Its protection extends to offenders as well as to the law abiding. *Weeks* v. *United States*, 232 U. S. 383. *Agnello* v. *United States*, 269 U. S. 20, 32. The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests.

> Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime. *United States* v. *Kirschenblatt,* 16 F. (2d) 202, 203. *Go-Bart Co.* v. *United States, supra,* 358. 285 U. S. at 464.

Rule 41(b) of the Federal Rules of Criminal Procedure still specifies these three, and only these three, grounds for the issuance of a warrant to search for and seize any property:

> (1) Stolen or embezzled in violation of the laws of the United States; or
>
> (2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or
>
> (3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18 U.S.C., §957 [Possession of property in aid of foreign government].

The conduct of the agents of the Internal Revenue Service in the instant case proved that they were trying to convert inspection provisions into general warrants to search for evidence. They were not seeking to collect any taxes; for the petitioner was the holder of a federal retail liquor dealer's occupational tax stamp. They were not looking for an illicit distillery; for in such a quest 26 U.S.C. §5203 (b) provides that, where entry is refused, "it shall be lawful for such officer, at all times, as well by night as by day, to use such force as is necessary for him to gain entry to such premises." Whatever may be the constitutional status

of this provision, it is there. The agents in the instant case were simply engaged in an unconstitutional general search to see what they could find.

The conduct of the agents of the Internal Revenue Service in the instant case also proves the necessity of interposing between the individual and "the discretion of the official in the field," *Camara* v. *Municipal Court*, 387 U. S. 523, 532 (1967), the detached scrutiny and the consequent deliberate impartial judgment of a judicial officer, as the Court has often pointed out. The agents began with a force of four strong: three of them; and a policeman from the Nassau County Police Department (5a). Later they were joined by an Internal Revenue Service Area Supervisor (6a), for a total of five. They made a search of that portion of petitioner's premises which was open to the public (5a). Then without the petitioner's consent they also searched non-public portions of the premises, including the basement (5a-6a). Thereafter, without permission and without a warrant they broke open the petitioner's locked liquor storeroom (6a). The agents entered the storeroom, and, as their own receipt shows, seized 53 bottles of liquor, some full and others partially filled, and two funnels. They seized 38 bottles "to determine if genuine":

| CONTAINERS | | | | |
|---|---|---|---|---|
| *umber* | *Size* | *Portion Filled* | *Description of Contents* | *Purpose of Analysis or Test* |
| 1 | Qt | Full | J&B Scotch | To Determine if Genuine |
| 2 | Qt | Full | J&B Scotch | To Determine if Genuine |
| 3 | Qt | Full | J&B Scotch | To Determine if Genuine |
| 4 | Qt | Full | J&B Scotch | " " " " |
| 5 | Qt | Full | J&B Scotch | " " " " |

| Containers | | | | |
|---|---|---|---|---|
| *Number* | *Size* | *Portion Filled* | *Description of Contents* | *Purpose of Analysis or Test* |
| 6 | Qt | Full | J&B Scotch | " " " " |
| 7 | Qt | Full | J&B Scotch | " " " " |
| 8 | Qt | Full | J&B Scotch | " " " " |
| 9 | Qt | Full | J&B Scotch | " " " " |
| 10 | Qt | Full | Chivas Regal | " " " " |
| 11 | 4/5 | Full | Chivas Regal | " " " " |
| 12 | 4/5 | Full | Chivas Regal | " " " " |
| 13 | 4/5 | Full | Haig & Haig Pinch | " " " " |
| 14 | 4/5 | Full | " " " " | |
| 15 | Qt | Full | White Label Scotch | To Determine if Gen |
| 16 | 4/5 | Full | " " " " | " " " " |
| 17 | 4/5 | 3/4 | " " " " | " " " " |
| 18 | 4/5 | 3/4 | " " " " | " " " " |
| 19 | Qt | Full | Haig Scotch | " " " " |
| 20 | Qt | 1/2 | " " " | " " " " |
| 21 | 4/5 | Full | Grant's Scotch | " " " " |
| 22 | Qt | 1/4 | Ballantines Scotch | " " " " |
| 23 | Qt | 1/4 | 100 Pipers Scotch | " " " " |
| 24 | 4/5 | Full | Wild Turkey | " " " " |
| 25 | 4/5 | Full | " " | " " " " |
| 26 | 4/5 | 3/4 | " " | " " " " |
| 27 | Qt | Full | Hennessy Cognac | " " " " |
| 28 | 4/5 | 1/2 | " " " " | " " " " |
| 29 | 4/5 | Full | " " " " | " " " " |
| 30 | 4/5 | 1/2 | Seagrams 7 Crown | " " " " |
| 31 | 4/5 | Full | Seagram's Crown Royal | To Determine if Gen |
| 32 | 4/5 | Full | " | " " " " " |
| 33 | 4/5 | 1/2 | Schenley | " " " " " |
| 34 | Qt | Full | I.W. Harper | " " " " " |
| 35 | Qt | Full | Canadian Club | " " " " " |
| 36 | 4/5 | 1/2 | Old Grand-Dad | " " " " " |
| 37 | 4/5 | Full | Jack Daniels | " " " " " |
| 38 | 4/5 | 1/2 | Drambuie | " " " " " |

(11a-13a)

They seized 15 more bottles as a "comparative sample":

| CONTAINERS | | | | |
|---|---|---|---|---|
| *ber* | *Size* | *Portion Filled* | *Description of Contents* | *Purpose of Analysis or Test* |
| A | ⅘ | Full | Wild Turkey | Comparative Sample |
| B | Qt | Full | I.W. Harper | " " " |
| C | ⅘ | Full | Seagram's Crown Royal | " " " |
| D | ⅘ | Full | Old Grand-Dad | " " " |
| E | Qt | Full | J&B Scotch | " " " |
| F | Qt | Full | Haig Scotch | " " " |
| G | ⅘ | Full | White Label | " " " |
| H | ⅘ | Full | Grants Scotch | Comparative Sample |
| H-2 | ⅘ | Full | Ballantine Scotch | " " " " |
| I | ⅘ | Full | Chivas Regal | " " " " |
| J | ⅘ | Full | Jack Daniels | " " " " |
| K | Qt | Full | Canadian Club | " " " " |
| L | Qt | Full | Seagrams VO | " " " " |
| M | Qt | Full | 100 Pipers | " " " " |
| N | Qt | Full | Haig & Haig | " " " " |

14a)

They seized two funnels "for evidence":

| CONTAINERS | | | | |
|---|---|---|---|---|
| *er* | *Size* | *Portion Filled* | *Description of Contents* | *Purpose of Analysis or Test* |
| | | | Plastic Funnel Sm. | For Evidence |
| | | | Metal Funnel Lg. | For Evidence |

Clearly the agents in the instant case were making the kind of general exploratory search which was one of the factors involved in the American Revolution, and which subsequently led to the adoption of the Fourth Amendment.

The government's reliance in its brief on 18 U.S.C. §3109 is wholly misplaced; for section 3109 deals with the use of force in the execution of a warrant.

## V

**In any event, as a matter of statutory construction, the inspection provisions involved in the instant case do not contemplate the use of force.**

Whenever the Congress wanted to provide for the use of force in search and seizure cases, it did so in specific terms. It did so in specific terms, for instance, in 18 U.S.C. §3109, where it provided for the use of necessary force in the execution of a warrant. It did so in 26 U.S.C. §5203 (b), for instance, when it provided for the use of necessary force in the entry of a distilled spirits plant.

By way of contrast, the Congress did not provide for the use of force in the inspection provisions in the instant case, 26 U.S.C. §§5146(b) and 7606(a). Rather the Congress provided in 26 U.S.C. §7342 for a forfeiture of $500.00 for each refusal to comply with a demand for inspection under 26 U.S.C. §7606, a provision which is comparable to the ordinance involved in *Frank* v. *Maryland,* 359 U. S. 360 (1959). *Cf. Zap* v. *United States,* 328 U. S. 624 (1946), *vacated on other grounds,* 330 U. S. 800 (1947). In addition, 26 U.S.C. §7212(a) makes it a felony punishable by fine or imprisonment, or both, to attempt to interfere with the administration of the internal revenue laws. Plainly the inspection statutes in the instant case do not contemplate the use of force.

The government in its brief, after quoting the inspection provision in an Act of 1791, discloses in a footnote that the 1791 Act also contained a warrant procedure (Brief, p. 11, n. 9). The government could have added

that ever since that time there has consistently been provision for a warrant procedure. The current provision is in the Internal Revenue Code of 1954. It is to be found in 26 U.S.C. §7302. This section provides, with reference to any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, that: "A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property."

## Conclusion

**The Court should reverse the judgment of the Second Circuit, and affirm that of the District Court.**

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# SUPREME COURT OF THE UNITED STATES

No. 108.—October Term, 1969

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| The Colonnade Catering Corp., Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit. |

[February 25, 1970]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner, a licensee in New York authorized to serve alcoholic beverages and also the holder of a federal retail liquor dealer's occupational stamp tax, 26 U. S. C. § 5121 (a), brought this suit to obtain the return of seized liquor and to suppress it as evidence. The District Court granted the relief. The Court of Appeals reversed. 410 F. 2d 197. The case is here on a petition for writ of certiorari which we granted, 396 U. S. 814, to review the decision in light of *Camara* v. *Municipal Court*, 387 U. S. 523, and *See* v. *City of Seattle*, 387 U. S. 541.

Petitioner runs a catering establishment. A federal agent, member of the Alcohol and Tobacco Tax Division of the Internal Revenue Service, was a guest at a party on petitioner's premises and noted a possible violation of the federal excise tax law. When the federal agents later visited the place, another party was in progress. They noticed that liquor was being served. Without the manager's consent, they inspected the cellar. Then they asked the manager to open the locked liquor storeroom. He said that the only person authorized to open that room was one Rozzo, petitioner's president, who was not on the premises. Later Rozzo arrived and refused to

open the storeroom. He asked if the agents had a search warrant and they answered that they did not need one. When Rozzo continued to refuse to unlock the room, an agent broke the lock and entered. Then they removed the bottles of liquor now in controversy and which they apparently suspected of being refilled contrary to the command of 26 U. S. C. § 5301 (c).

It is provided in 26 U. S. C. § 5146 (b)[1] and in 26 U. S. C. § 7606[2] that the Secretary of the Treasury or his delegate has broad authority to enter and inspect the premises of retail dealers in liquors.[3] And in case of the refusal of a dealer to permit the inspection, it is provided in 26 U. S. C. § 7342:

> "Any owner of any building or place, or person having the agency or superintendence of the same, who refuses to admit any officer or employee of the Treasury Department acting under the authority of section 7606 (relating to entry of premises for examination of taxable articles) or refuses to permit him

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[1] 26 U. S. C. § 5146 (b) provides:

"The Secretary of his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises."

[2] 26 U. S. C. § 7606 provides:

"(a) Entry during day.

"The Secretary or his delegate may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects.

"(b) Entry at night.

"When such premises are open at night, the Secretary or his delegate may enter them while so open, in the performance of his official duties."

[3] As defined in 26 U. S. C. § 5122 (a).

> to examine such article or articles, shall, for every such refusal, forfeit $500."

The question is whether the imposition of a fine for refusal to enter—with the attendant consequences that violation of inspection laws may have in this closely regulated industry—is under this statutory scheme the exclusive sanction, absent a warrant to break and enter.

In *Frank* v. *Maryland*, 359 U. S. 360, 366–367, a case involving an inspection under a municipal code, we said:

> ". . . the inspector has no power to force entry and did not attempt it. A fine is imposed for resistance, but officials are not authorized to break past the unwilling occupant."

*Frank* v. *Maryland* was overruled in *Camara* v. *Municipal Court, supra,* insofar as it permitted warrantless searches or inspections under municipal fire, health, and housing codes. The dictum that the provision for a fine on refusal to allow inspection made the use of force improper when there was no warrant was not disturbed; and the question is whether that dictum contains the controlling principle [4] for this case.

The Government, emphasizing that the Fourth Amendment bans only "unreasonable searches and seizures,[5] relies heavily on the long history of the regulation of the liquor industry during pre-Fourth Amendment days, first in England and later in the American Colonies. It is pointed out, for example, that in 1660 the precursor of modern-day liquor legislation was enacted in England [6]

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[4] And see *United States* v. *Frisch*, 140 F. 2d 660, 662.

[5] The Fourth Amendment reads as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[6] 12 Car. 2, c. 23, § 19.

which allowed commissioners to enter, on demand, brewing houses at all times for inspection. Massachusetts had a similar law in 1692.[7] And in 1791, the year in which the Fourth Amendment was ratified, Congress imposed an excise tax on imported distilled spirits and on liquor distilled here,[8] under which law federal officers had broad powers to inspect distilling premises and the premises of the importer[9] without a warrant. From these and later laws and regulations governing the liquor industry, it is argued that Congress has been most solicitous in protecting the revenue against various types of fraud and to that end has repeatedly granted federal agents power to make warrantless searches and seizures of articles under the liquor laws.

The Court recognized the special treatment of inspection laws of this kind in *Boyd* v. *United States*, 116 U. S. 616, 624:

> ". . . in the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment."

And it added:

> "The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for

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[7] Act of June 8, 1692.

[8] Act of March 3, 1791, 1 Stat. 199.

[9] Section 29 of the Act of March 3, 1791, 1 Stat. 206, provided: "That it shall be lawful for the officers of inspection of each survey at all times in the daytime, upon request, to enter into all and every the houses, store-houses, ware-houses, buildings and places which shall have been [registered] in manner aforesaid, and by tasting, gauging or otherwise, to take an account of the quantity, kinds and proofs of the said spirits therein contained; and also take samples thereof, paying for the same the usual price."

> a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own Revenue Acts from the commencement of the Government. The first statute passed by Congress to regulate the collection of duties, the Act of July 31, 1789, 1 Stat. 29, 43, contains provisions to this effect. As this Act was passed by the same Congress which proposed for adoption the original Amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment." *Id.*, at 623.

We agree that Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand. The general rule laid down in *See* v. *City of Seattle, supra,* at 545—"that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure"—is therefore not applicable here. In *See,* we reserved decision on the problems of "licensing programs" requiring inspection, saying they can be resolved "on a case-by-case basis under the general Fourth Amendment standard of reasonableness." *Id.,* p. 546.

Where Congress has authorized inspection but made no rules governing the procedure which inspectors must follow, the Fourth Amendment and its various restrictive rules apply. We said in the *See* case:

> "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon

his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." *Id.*, at 543.

What was said in *See*, reflects this Nation's traditions that are strongly opposed to using force without definite authority to break down doors. We deal here with the liquor industry long subject to close supervision and inspection. As respects that industry, and its various branches including retailers, Congress has broad authority to fashion standards of reasonableness for searches and seizures. Under the existing statutes, Congress selected a standard that does not include forcible entries without a warrant. It resolved the issue not by authorizing forcible, warrantless entries, but by making it an offense for a licensee to refuse admission to the inspector.

*Reversed.*

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[February 25, 1970]

Mr. Justice Black, with whom The Chief Justice and Mr. Justice Stewart join, dissenting.

Petitioner brought proceedings under the Federal Rules of Criminal Procedure for the return of liquor seized by federal agents. One of those rules provides that "[a] person aggrieved by an *unlawful* search and seizure may move the district court . . . for the return of the property . . . so obtained on the ground that (1) the property was *illegally* seized without a warrant . . . ." Fed. Rule Crim. Proc. 41 (e). (Emphasis added.) As I read that provision, it requires petitioner to show that the seizure in this case was illegal, either because it violated the Fourth Amendment, or because it was in violation of some law passed by Congress. In my opinion neither requirement has been met and therefore petitioner is not entitled to a return of the seized liquor.

There can be no doubt that places which sell liquor to the public have historically been subjected to strict governmental scrutiny for many centuries both in this country and in England. The Court sets out a little of the history of that regulation in its opinion. I therefore agree that there is nothing unreasonable, as that term is used in the Fourth Amendment, in permitting officers to go into an establishment that provides alcoholic beverages to the public, and upon finding something that indicates a flagrant violation of the law to pursue their examination to see whether a violation is actually occur-

ring. The officers did just that in this case, and I see no reason on earth why any man should hold that conduct unreasonable. This Court certainly should not prevent faithful officers, when they see the law being violated practically before their very eyes, from taking the steps necessary to stop and prove that violation.

The majority, far from finding this search unreasonable and therefore illegal under the Fourth Amendment, holds only that it was not authorized by 26 U. S. C. §§ 5146 (b), 7606 (a),[1] and that therefore the liquor must be returned. While these statutes do not in express terms authorize forcible breaking and entering to seize liquor kept in violation of federal law, it is perfectly clear that they do not in express terms declare such seizure illegal, and in my opinion those provisions impliedly authorize exactly the type of official conduct involved here. I am confident that when Congress said that federal liquor agents could search without a warrant and further provided for fines if the owner refused to permit such a search,[2] it also intended to authorize forcible entry and seizure if that became necessary. I do not think Congress needed to speak any more clearly than it already has. Since I cannot conclude that this search and seizure was illegal under either the Fourth Amendment or any Act of Congress, but was to the contrary carried out pursuant to congressional authorization, I would affirm the judgment below and hold that petitioner was not entitled to a return of the liquor.

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[1] Set forth at nn. 1, 2, p. 2, *ante*.

[2] 26 U. S. C. § 7342, pp. 2–3, *ante*.

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[February 25, 1970]

Mr. Chief Justice Burger, with whom Mr. Justice Black and Mr. Justice Stewart join, dissenting.

I join in the dissenting opinion of Mr. Justice Black; however since my position goes somewhat beyond his discussion I add my views separately.

I assume we could all agree that the search in question must be held valid, and the contraband discovered subject to seizure and forfeiture, unless (a) it is "unreasonable" under the Constitution or (b) it is prohibited by a statute imposing restraints apart from those in the Constitution. The majority sees no constitutional violation; I agree.

The controlling statutes set out in notes 1 and 2 of the majority opinion affirmatively define the conditions and times when agents may enter premises and inspect. Under 26 U. S. C. § 5146 (b) agents may enter to inspect "any distilled spirits, wines or beer kept or stored by such dealer on such premises." The time when this may be done is fixed as "during business hours." Section 7606 of 26 U. S. C. set forth in note 2 of the majority opinion provides that agents may enter any building where taxable articles are kept, "so far as it may be necessary for the purpose of examining said articles or objects."

The government agents needed neither a warrant nor these statutes to secure entry to this place of business

since it was as open as any business establishment which seeks to sell goods and services to the public. The agents need to rely on the statutes only to carry out their duty to inspect after accomplishing entry. This was recognized implicitly by Congress in limiting the inspection to "business hours" and daytime. Congress went beyond mere entry; it provided for *inspection.* Inspection authorization would be meaningless if the agents could not open lockers, cabinets, closets, and storerooms and indeed pry open cases of liquor to see the contents.

Surely Congress was not unaware that purveyors of liquor do not leave their wares or stores or reserve supplies lying casually about; on the contrary they keep supplies under lock in various ways, including lockers, cabinets, closets, or storerooms; this practice is so universal it can be judicially noticed.

Here the agents acted explicitly under statutes containing the language "so far as it may be necesary"; this is simple and clear and for me it is plainly broad enough to permit inspection of all spirits "kept or stored . . . on such premises" whether in lockers, cabinets, closets, or storerooms. Congress having prescribed this as a reasonable means of enforcing the inspection necessary to tax collection, I see no basis for any court to say it cannot be done.

That Congress provided an added penalty for those who refuse access for inspection is irrelevant. We can assume this was to encourage licensed purveyors to comply promptly to facilitate inspections. The majority views the $500 fine as the Government's exclusive remedy for the non-cooperation of the taxpayer. Congress could hardly be so naive as to give to the licensee the option to choose between the risk of a $500 fine against the certain discovery, if he is in violation, of a large store of liquor subject to forfeiture. At current prices $500

would represent four or five cases of spirits. The alternative of securing a warrant touches on the constitutional issues which the majority does not rely on. We should note, of course, that the majority holding eliminates any basis for a forfeiture of the contraband liquor and leaves the Government to another lawsuit to collect a $500 fine.

With deference I submit the majority has needlessly complicated a relatively simple issue of statutory construction with undertones of constitutionally limited searches. The words "so far as it may be necessary" are quite plain and we all agree no issue of constitutional dimensions is presented.